# 93-812

No. ———

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IN THE
## Supreme Court of the United States
OCTOBER TERM, 1993

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RED CLAY CONSOLIDATED SCHOOL DISTRICT
BOARD OF EDUCATION, *et al.*,
*Petitioners*,

v.

ALDEN JENKINS, *et al.*,
*Respondents*.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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November 17, 1993

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## QUESTIONS PRESENTED

1. Can white bloc voting be found "usually to defeat" the minority's preferred candidate where the percentage of electoral success for minority-preferred candidates exceeds proportional representation?

2. Can a violation of section 2 of the Voting Rights Act be established without regard to evidence that the relevant voter behavior was not racially motivated?

## LIST OF PARTIES

The parties to the proceeding below were petitioners, Red Clay Consolidated School District Board of Education, David C. Allen, Charles M. Cavanaugh, Richard P. Eckman, Susan A. Mathe, Sherilynn Jackson, William E. Manning, Patricia Reinbold, Carol Scotton, and Irwin Becnel; and respondents, Alden Jenkins, Harlan Roberts, and Gwendolyn Neal, acting on behalf of themselves and others similarly situated.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 4 F.3d 1103 (3d Cir. 1993) and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a.

The opinion of the United States District Court for the District of Delaware is reported at 780 F. Supp. 221, and is reprinted at Pet. App. 68a.

## JURISDICTION

The judgment of the court of appeals was issued on August 19, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

42 U.S.C. § 1973:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(b)(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

## STATEMENT OF THE CASE

This case arises from a class action challenge to the at-large scheme for electing members of the school board for the Red Clay Consolidated School District in Delaware ("the

District") pursuant to section 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973. The named plaintiffs, on behalf of all eligible black voters in the District, alleged that the current method of electing the school board constitutes unlawful vote dilution in violation of section 2. Pet. App. 5a. The dispositive issues before the court of appeals concerned (1) the appropriate criteria for determining whether white bloc voting is sufficient "usually to defeat" minority-preferred candidates as required by the third part of the threshold test for vote dilution claims set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and (2) the relevance of voter motivation to determining whether a section 2 violation can be established.

The District was established by the Delaware State Board of Education in November of 1980, and was approved by the United States District Court for the District of Delaware as part of its supervision of public school desegregation. *See Evans* v. *Buchanan*, 512 F. Supp. 839 (D. Del. 1981). Accordingly, the parties here stipulated that the District's electoral system was adopted without discriminatory intent. The District contains part of the city of Wilmington as well as suburban areas of nearby New Castle County. According to 1980 census figures, 11.1% of the District's voting age population was black. At the time of the 1990 census, black citizens comprised 12.97% of the voting age population. Pet. App. 6a-7a.

The Red Clay Consolidated School District Board of Education (the "Board") has seven members, each of whom normally serves a term of five years. Each Board Member must be a resident of one of the seven nominating districts (denoted by the letters A through G) and must run for the seat associated with that nominating district. Beyond the residency requirement, the only requirement for becoming a candidate is submission of a petition signed by twenty eligible district voters. Elections are conducted on an at-large, non-partisan basis. Elections are staggered, so that

only one or two seats are up for election each May. Pet. App. 7a.

Voters may vote at any polling place in the district. They may vote for a single candidate running for each of the seats up for election in that year. There is no voter registration; any resident of the district who is at least eighteen years of age may vote. There is no majority vote requirement — a candidate who receives at least a plurality of the votes for a particular seat is elected. Pet. App. 7a.

In the period between 1981 and 1991, twenty-five vacant seats on the Red Clay School Board were filled: twenty by contested elections, three by uncontested elections, and two by appointment. Ten black candidates ran in nine separate contested elections, and three were elected (a 30% success rate). Sixty white candidates ran in contested elections, with 17 winning election (a 28% success rate). Pet. App. 9a-10a. Black candidates have won two of the eight contested elections involving black and white candidates (a 25% success rate). *Id.* Even without considering the 1991 election, nine of the sixty-nine school board candidates were black (a 13% participation rate); two of these nine black candidates were elected (a 22.2% success rate); and black candidates had won two of the eighteen total contested seats (an 11.1% success rate). Pet. App. 79a-80a.

The complaint in this case was filed on May 5, 1989. Following a six-day bench trial, the district court filed an extensive opinion rejecting plaintiffs' section 2 claims. The district court followed the legal analysis for evaluation of vote dilution claims set forth by this Court in *Gingles*. Under *Gingles*, plaintiffs must establish three "necessary preconditions" for a finding of vote dilution: (1) that the minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that the "white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances ... — *usually to*

*defeat* the minority's preferred candidate." 478 U.S. at 50-51 (emphasis added). *Gingles* also established that "persistent proportional representation" is inconsistent with a claim of vote dilution. 478 U.S. at 77 (opinion of Brennan, J.), 102 (O'Connor, J., concurring in the judgment).

The district court reviewed the history of elections in the District that is described above:

> In considering whether this is a positive or negative record, the Court begins by noting that approximately 13 percent of the voting age population in the District is black. Assuming proportional representation were appropriate, one would expect that on the average one of every seven board members would be black *and that black candidates would win approximately 13 percent of the elections.*
>
> The fact is that black citizens have achieved some electoral success in the District. In 1981 through 1985 and in 1990 through the present, black candidates have sat on the board in percentages greater or equal to the proportion of black citizens in Red Clay. When one considers all of the election years, blacks have won 15 percent of the contested seats, 25 percent of the elections involving black and white candidates and 33 percent of the elections involving black candidates. Prior to the initiation of this suit, blacks had won 6.6 percent of the contested elections and 14 percent of the elections involving black and white candidates.

Pet. App. 79a-80a (emphasis added).

While acknowledging this minority electoral success, the district court declined to rule that plaintiffs' suit was foreclosed outright on this basis, and proceeded to consider the three *Gingles* factors. Pet. App. 81a. Plaintiffs and defendants agreed that the first factor — the potential for black voters to constitute a majority in a single-member district — was satisfied. As to the second — black political cohesion — the district court found that "the evidence of minority voter cohesion in Red Clay has not been established by clear and convincing evidence but it was sufficient to establish by a preponderance of the evidence that black voters of Red Clay are usually politically cohesive." Pet. App. 91a.

The district court concluded that the plaintiffs had failed to prove the third *Gingles* factor — the existence of white bloc voting that usually defeats the minority-preferred candidate. The court emphasized that plaintiffs must present evidence showing that "white voters *usually* vote in a way to defeat the black voters' choice of candidate." Pet. App. 92a (emphasis in original). Analyzing the expert statistical testimony, the court found that plaintiffs failed to "establish that the white citizens of Red Clay usually vote in a manner which defeats the black citizens' choice of candidate." Pet. App. 97a.

The district court went on, however, "for the sake of providing a comprehensive opinion," to consider the "totality of the circumstances." Pet. App. 21a. Reviewing the past history and present conditions in the district, the court noted the absence of barriers to minority participation in the District's political life. Turnout rates of black and white voters were roughly equivalent, Pet. App. 100a; the vestiges of past discrimination did not create impediments to successful minority candidacies, Pet. App. 101a; and the slating,

plurality voting, lack of a registration requirement, and other features of the District's political process favored full minority participation, Pet. App. 102a-105a.

Plaintiffs appealed to the United States Court of Appeals for the Third Circuit. Before the court of appeals, defendants emphasized the two arguments that are at issue in this petition. First, black voters in the District have been successful in electing representatives of their choice in proportions *greater* than their proportion in the Red Clay electorate. *Brief for Defendants-Appellees* at 26. Defendants accordingly argued that the success of black candidates supported the district court's conclusion that vote dilution could not be found on the record. Pet. App. 22a.

Defendants also emphasized the uncontested evidence that a non-racial factor was determinative in all District elections since 1985. Specifically, voting patterns in District elections were determined by the candidates' position on the "feeder pattern" issue — a controversy involving transportation and school assignments of District pupils:

> Since 1985, voting patterns in Red Clay elections have been determined primarily by a candidate's position on this key issue. (App. 1, at 73, 119; App. 2, at 380-381; 471-476; 515-520, 524-526, 738-740; App. 3, at 1172-1175). All of the lay and expert testimony on this issue was consistent, and Plaintiffs did not contest that this issue has determined the outcome of Red Clay elections since 1985. *Id.* In fact, Dr. Johnson, the Red Clay School superintendent from 1981 until 1990 who is black, testified that candidate positions on this issue, rather than race,

> was the driving force behind Red Clay School Board elections.

*Brief for Defendants-Appellees* at 8.

In short, defendants argued in the court of appeals that the feeder pattern issue "has been the driving force of the election results in Red Clay elections since 1985. Thus, not only was Plaintiffs' evidence of white bloc voting deficient, there is uncontradicted evidence of an independent cause for that failure of proof." *Id.* at 44.

The Third Circuit rejected defendants' arguments and reversed the district court. The court of appeals acknowledged that black candidates "won three out of the twenty contested elections between 1981 and 1991, or roughly 15%, a *success rate* which, given that 12.97% of the total voting age population of the Red Clay School District is black, *exceeds proportional representation.*" Pet. App. 54a-55a (emphasis added).[1] Nonetheless, the court held that plaintiffs had shown that minority candidates were "usually defeated." Pet. App. 33a-34a.[2] The court of appeals ap-

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[1] The court of appeals noted that even if the two appointed seats and three uncontested races were included, this "would still give black candidates a success rate of 12%, just under their percentage in the electorate." Pet. App. 55a.

[2] The court of appeals held that the district court erred in its analysis of white bloc voting by focusing on the fact that minority candidates need not obtain an outright majority of votes to win. This was said to be error because neither black nor white candidates had actually been elected in significant numbers *by reason of the plurality vote mechanism*. Pet. App. 35a. At issue here is the more basic problem with the court of appeals' analysis: minority-preferred candidates *had been elected* (by whatever mechanism) in numbers exceeding proportional representation.

proved of the district court's initial decision not to declare plaintiffs' lawsuit foreclosed on the basis of "persistent proportional representation." Pet. App. 56a. Yet it proceeded in the face of the evidence of minority electoral success that admittedly *exceeded* proportional representation to conclude as a matter of law that minority candidates were "usually" defeated for purposed of a *Gingles* analysis.

The court of appeals also rejected the argument that an independent nonracial cause for the pattern of electoral results in the district precluded a finding of legally significant white bloc voting. Plaintiffs argued before the Third Circuit that voter motivation is "legally irrelevant" and that bloc voting analysis is "simply ... a correlation between the race of the voters and the votes for white and black candidates, without regard for the reasons or motivation." *Reply Brief for Plaintiffs-Appellants* 11-12. The court of appeals agreed. Adopting the position of the Tenth Circuit, the court of appeals held that the only relevant inquiry was whether minority and majority voters vote for different candidates, and if so whether the candidates preferred by the minority are successful. The Third Circuit excluded from its legal test consideration of whether the electoral result turned on nonracial motivations. It instead adopted the view of the Tenth Circuit that the *reasons* for voter preferences are irrelevant to a section 2 inquiry. Pet. App. 40a-41a.[3]

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[3] The court of appeals also reversed the district court's finding that there was no violation under a "totality of the circumstances" analysis, dismissing the district court's analysis as "conclusory" despite the fact that it covers eight printed pages in the Federal Supplement. Pet. App. 21a.

## REASONS FOR GRANTING THE WRIT

The court of appeals' decision presents two important questions of voting rights law on which the Court's guidance is needed: (1) the standard by which courts can determine whether white bloc voting will "usually defeat" minority choices, and (2) the relevance of voter motivation to determining whether white bloc voting is "legally significant." The Court should grant certiorari to resolve conflicts of authority on these issues.

### I. THE COURT SHOULD RESOLVE CONFLICTS AMONG THE COURTS OF APPEALS OVER WHETHER WHITE BLOC VOTING CAN BE HELD "USUALLY TO DEFEAT" MINORITY-PREFERRED CANDIDATES WHERE THEIR ELECTORAL SUCCESS RATE EXCEEDS PROPORTIONAL REPRESENTATION

The Court's opinion in *Gingles* requires that all vote dilution plaintiffs show the presence of legally significant white bloc voting sufficient "*usually to defeat* the minority's preferred candidate." 478 U.S. at 51 (emphasis added). Among the factors the Court stated are determinative under this test is "the percentage of registered voters in the district who are members of the minority group." *Id.* at 56. To date, however, the court has not given more specific guidance on the relation between minority voting population percentage and the electoral success rate of minority-preferred candidates in determining whether white bloc voting "usually" defeats minority choices. That question is squarely presented here by a record on which white bloc voting was found "usually to defeat" minority-preferred candidates despite the fact that minority-preferred candidates were elected in a percentage *exceeding* proportionality.

### A. The Third Circuit Held that Plaintiffs Showed White Bloc Voting "Usually Defeated" Minority-Preferred Candidates Despite a Minority Electoral Success Rate Exceeding Proportional Representation

Both the district court and the court of appeals addressed the legal issues in this case on the basis of a clear electoral record. In short, the court of appeals held that there was sufficient evidence that white bloc voting operated "usually to defeat" minority preferred candidates in a 13 percent minority district where three out of ten black candidates (30%) had achieved election; where black candidates had won two out of eight contested elections (25%) involving black and white candidates; and where black candidates had won three of twenty total contested elections (15%). Nonetheless, the court of appeals held that plaintiffs had shown minority-preferred candidates were "usually defeated" for purposes of a section 2 *Gingles* analysis. Pet. App. 33a-35a. It did so in the face of a clear record establishing the *absence* of barriers to minority participation in the Red Clay political process, and despite a participation rate from minority candidates commensurate with the percentage of minority citizens in the electorate. *See supra* at 4, 6-7.

Ordinarily, the important question of the legal effect of proportional minority success on the third *Gingles* inquiry might by obscured by the numerous subsidiary issues commonly present in voting rights cases. For example, lower court analysis will often turn on disputes over which candidates are "minority preferred," or over claims that minority electoral success should not be considered due to "special circumstances." That is not a problem here. This case is an appropriate vehicle for the Court to provide

further clarification on the third *Gingles* precondition because the Third Circuit explicitly assumed away the complicating issues.

First, the court of appeals eliminated from its analysis consideration of whether the victories of particular minority candidates should be ignored or discounted. The court stated that "[e]ven assuming that both [the two contested candidates] were minority-preferred, there was still a sufficient basis for the district court to have found legally significant white bloc voting." Pet. App. 53a. Second, the Third Circuit assumed for purposes of its holding that the electoral success of black candidates was unaffected by any "special circumstances," stating that "plaintiffs' evidence would have been sufficient to support a finding in its favor on white bloc voting irrespective of the existence of special circumstances." Pet. App. 25a.

In its opinion, the court of appeals announced that "section 2 establishes a right on the part of [minority] citizens for their preferred minority candidates to have an *equal opportunity to be elected*." Pet. App. 47a (emphasis added). But the court's use of the word "equal" obviously does not refer to electoral success proportionate to representation in the electorate or among candidates, both of which were present here. Instead, the court of appeals' apparent holding is that minority-preferred candidates must win *equally often*, without regard to the relative proportion of minority and majority voters in the electorate or to the participation rate of minority candidates. Surely that is not the law. Yet it is the result apparently reached by the Third Circuit in the absence of direction from this Court as to "how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Gingles*, 478 U.S. at 88 (opinion of O'Connor, J.).

The court of appeals compounded its erroneous approach to the third *Gingles* factor by confining its consideration of proportional minority electoral success solely to what it termed a separate "threshold" inquiry as to whether the *Gingles* factors should have been considered at all. Pet. App. 53a-55a. The court of appeals purported fully to deal with the evidence of minority electoral success by simply affirming this aspect of the district court's opinion. Pet. App. 55a.[4] In addressing the third *Gingles* factor, the Third Circuit focused exclusively on the question whether minority-preferred candidates had succeeded by reason of the rules allowing victory by a *plurality*. Pet. App. 35a. The court of appeals missed the broader (and far more important) point: that as a general matter minority electoral success exceeding proportionality is inconsistent with a finding that minority candidates are "usually defeated."

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[4] In this respect, the court of appeals' opinion confuses its own characterization of the *Gingles* factors. The Third Circuit stated that the "extent to which minority group members have been elected to public office in the jurisdiction" is an issue "directly addressed by *Gingles* factors 2 and 3." Pet. App. 17a. The court of appeals also acknowledged that a showing that minority-preferred candidates were "consistently able to prevail in representative numbers" would have required affirmance of the district court if minority candidates had in fact prevailed by virtue of a *plurality* vote. Pet. App. 32a. Yet in determining whether a finding of vote dilution was otherwise supportable the court of appeals inexplicably ignored its own recognition that minority-preferred candidates *were* consistently able to prevail in representative numbers. Pet. App. 54a-55a.

### B. Other Circuits Have Held that Section 2 Does Not Establish a Right to Proportional Representation, Much Less to Minority Electoral Success That Exceeds It

In contrast to the Third Circuit, other courts of appeals have recognized that white bloc voting cannot be said "usually to defeat" the choices of minority voters in the absence of proof that minority candidates have failed to achieve a success rate commensurate with minority representation in the electorate. Other courts have routinely rejected claims that amount to arguments for proportional representation as inconsistent with this Court's opinions and with the statute itself. *See* 42 U.S.C. 1973 ("*Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

For example, in *Valladolid* v. *City of National City*, 976 F.2d 1293 (9th Cir. 1992), the Ninth Circuit upheld the district court's grant of summary judgment to vote dilution defendants on the ground that the plaintiffs had failed to produce sufficient evidence of the third *Gingles* factor. The evidence in *Valladolid* showed that in 1990, National City's population was 49.6% Hispanic, 7.9% black, 26% non-Hispanic white, and 16.4% other. The Ninth Circuit noted that "[o]f the sixteen city council seats to have been contested by black or Hispanic candidates from 1968 onwards, black or Hispanic candidates have won seven." 976 F.2d at 1294. In the specific elections on which plaintiffs offered proof, minority preferred candidates had prevailed. On this basis, the district court held as a matter of law that the plaintiffs had failed to present proof that minority preferred candidates "usually lost," and the court of appeals affirmed. *Id.* at 1296.

In *Valladolid*, total minority population in the district was 57.5%. The minority electoral success rate was 43.75%. Yet the court of appeals affirmed the district court's holding that plaintiffs had not even raised a factual dispute as to whether the third factor could be shown. The contrast to this case is striking: here the minority electoral success rate *exceeded* minority representation in the electorate, yet the court of appeals reversed as clearly erroneous the district court's finding (following a six-day trial) that the third factor could not be shown.

For lack of a better term, there is also "half" a circuit conflict with the Eleventh Circuit on this issue. In *Solomon* v. *Liberty County*, 865 F.2d 1566 (11th Cir. 1988), Judge Tjoflat's panel opinion held that "unless the minority group can show that it is significantly underrepresented in proportion to its percentage of the total electorate, the minority group has no section 2 claim — even if racial prejudice and discrimination are rampant in the challenged electoral system." *Id.* at 1571. The Eleventh Circuit granted rehearing *en banc* in *Solomon*, but split five to five. 899 F.2d 1012 (11th Cir. 1990). The court remanded the case without directing the district court how to proceed, *id.* at 1013, with five judges continuing to adhere to Judge Tjoflat's panel opinion, *id.* at 1021. The split remains unresolved.

The Third Circuit's approach here perhaps finds some support in the Fourth Circuit's opinion in *Collins* v. *City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989). In *Collins*, the city's population was 35% black, and black candidates were consistently elected to one of seven council seats (14%). The court of appeals reversed the district court's finding that the plaintiffs could not show majority bloc voting "usually"

operated to defeat minority candidates. In dissent, Judge Chapman stated:

> The majority concludes that this case is not about electing a single candidate to the council, but is about the black community's success in choosing a *second*, that is, proportional representative. The majority does not cite any authority for the proposition that the correct legal test for bloc voting is whether the majority votes sufficiently as a bloc to usually defeat candidates *for a proportional seat*. There is no such authority.

*Id.* at 1247. Judge Chapman went on to examine the Court's opinion in *Gingles*, noting that "one might surmise that under *Gingles* proportionality and 'usual success' are not the same, but represent the upper and lower boundaries of a Section 2 analysis." *Id.* at 1248. He concluded:

> A proper test, which takes into account the meaning of the entire statute, would inquire as to whether black-preferred candidates are normally, or usually defeated. Such a rule does not measure a violation by a right of proportionality, which does not exist. By taking into account the historic success or failure of all black candidates, it would also provide a more accurate portrayal of vote dilution. It would recognize that the election of a single black is not unimportant, because in an at-large system the majority always has the strength to elect all of its candidates.

*Id.* at 1249.

Applying his proposed test, Judge Chapman concluded that "[u]nder such a test, between 1968 and 1986, 7 of the 13 black-supported candidates were elected to office. Therefore blacks have not normally or usually been defeated." *Id.* As with the Third Circuit's decision here, the Fourth Circuit majority's rejection of Judge Chapman's approach supports the proposition that white bloc voting can "usually defeat" minority-preferred candidates even where the *success rate* of minority-preferred candidates exceeds proportional representation.

Unlike the Third and Fourth Circuits, other courts have treated proportionality as an upper limit on what plaintiffs may legitimately claim. For example, in *Seastrunk* v. *Burns*, 772 F.2d 143 (5th Cir. 1985), the court of appeals noted that nothing in the Voting Rights Act affords a right of proportional representation. Treating proportionality as an upper limit, the court rejected the plaintiffs' claim that a redistricting plan should assure minorities a second seat on the Parish Board. *Id.* at 154 ("Considering the relative proportion of the black population in comparison to the whole, the blacks of the Parish would be entitled to only 12.4 per cent of the seats on any Board. For a twelve- or thirteen-member Board, this is only one seat."); *see also Baird* v. *Consolidated City of Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2334 (1993) ("All questions of intentional discrimination to one side, § 2(b) also implies that blacks who have influence proportional to their numbers do not state a claim under § 2(a)."); Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 Va. L. Rev. 1, 42 (1991) ("*Thornburg v. Gingles* implicitly treated proportionality as a ceiling on the political rights of black voters.").

Another aspect of the circuit conflict created by the Third Circuit's opinion here is its treatment of proportional representation as an issue separate and distinct from the third *Gingles* factor. *See* Pet. App. 25a (describing these as "separate contexts"). As illustrated by the discussion of *Valladolid* and *Collins* above, other courts have dealt with minority electoral success as part of their analysis of whether bloc voting "usually defeats" minority-preferred candidates. Indeed, this Court has affirmed the decision of a three-judge district court holding that proportional representation is properly viewed as an aspect of analyzing the third *Gingles* factor. *Nash* v. *Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992), *aff'd sub nom. African American Voting Rights Legal Defense Fund, Inc.* v. *Blunt*, 113 S. Ct. 1809 (1993).[5]

In addressing the argument that proportional representation was inconsistent with a section 2 claim, *Blunt* states:

> *Gingles* requires a successful § 2 plaintiff prove that white voters usually vote together as a block to defeat the minority-preferred

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[5] Although existing law provides little guidance on the point, there is nothing inherently implausible about *both* undertaking a "threshold" consideration of proportional representation (as the Third Circuit did here) and then considering minority electoral success as part of the third *Gingles* factor (as the Third Circuit failed to do). "Persistent proportional representation" for threshold purposes could appropriately be evaluated based on the "static" statistics showing the proportion of seats that have historically been held by minorities. But this would still leave the court to consider the "dynamic" statistics on the minority electoral success rate. Only electoral success rate statistics provide any meaningful measure of whether minority-preferred candidates are "usually defeated." In any event, there is no avoiding the need to look to minority electoral success for evaluating whether bloc voting "usually defeats" minority choices if those words are to convey any customary meaning.

> candidate. If defendants can prove prior persistent proportional representation, it would be virtually impossible for the plaintiffs to prove white voters usually vote together to defeat minority preferred candidates.

*Id.* at 1498. This language is certainly difficult to reconcile with the Third Circuit's rejection of proportional minority electoral success as an aspect of the third *Gingles* factor. Further guidance from the Court is needed.

The Court has already heard argument this Term in two cases that raise significant questions involving the relevance of proportional representation in section 2 litigation. *Johnson* v. *DeGrandy*, No. 92-519 (consolidated with *DeGrandy* v. *Johnson*, No. 92-593, and *United States* v. *Florida*, No. 92-767); *Holder* v. *Hall*, No. 91-2012. The Court should grant certiorari to provide guidance on the additional aspects of this area of voting rights law presented here. At a minimum, the Court should withhold its disposition of this petition pending the Court's decisions in *Holder* and *Johnson*, which will likely shed important light on any further proceedings here.

## II. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS OVER THE RELEVANCE OF VOTER MOTIVATION IN DETERMINING WHETHER A SECTION 2 VIOLATION CAN BE ESTABLISHED

The judgment below presents another significant question by rejecting unrefuted evidence of a non-racial voter motivation for the election results at issue. The Third Circuit specifically embraced the view of the Tenth Circuit in *Sanchez* v. *Bond*, 875 F.2d 1488 (10th Cir. 1989), *cert.*

*denied*, 498 U.S. 937 (1990), that voter motivation is irrelevant in determining whether white bloc voting is "legally significant," thereby adopting the view of Justice Brennan's plurality opinion in *Gingles*, 478 U.S. at 63. The courts of appeals are divided on the relevance of whether white bloc voting is *racially motivated*, and the Court should grant certiorari to resolve the issue.

### A. The Third Circuit Held that Voter Motivation is Not Relevant to Determining Whether Section 2 Has Been Violated

In finding that the third *Gingles* factor had been shown, the court of appeals ignored uncontradicted evidence of an independent cause for voter behavior not correlated with the race of voters or candidates. *See supra* at 7-8. In so doing, the Third Circuit adopted the view that "[i]t is the *difference* between the choices made by blacks and whites — not the reasons for that difference — that [matters]." 478 U.S. at 63 (Opinion of Brennan, J.). The court of appeals specifically cited as authority Justice Brennan's view that "[t]he essence of a § 2 claim ... is that where minority and majority voters consistently prefer *different* candidates the majority ... will regularly defeat the choices of minority voters." Pet. App. 58a (emphasis added).

The court of appeals took specific note of the controversy among the Justices in *Gingles* surrounding "an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns." Pet. App. 39a. It did so in the context of addressing the subsidiary question of whether the race of candidates, as opposed to voters, is relevant to the determination of which candidates are "minority-preferred" for purposes of evaluating white bloc voting. After discussing

the various approaches to this question that have been taken by other circuits, the court of appeals endorsed the Tenth Circuit's opinion in *Sanchez* v. *Bond*. Pet. App. 40a.[6]

The pertinent part of *Sanchez* adopted by the Third Circuit holds that "a court may not explain away evidence of racial bloc voting by finding that such voting is caused by underlying differences between the minority and white population. The *reasons* why minority voters may vote alike *is unimportant* in determining whether in fact the minority group votes as a bloc." 875 F.2d at 1493 (emphasis added). In other words, whether or not differing candidate preferences among white and black voters results from a non-racial motivation is irrelevant. Applying the *Sanchez* approach, the Third Circuit held that the only inquiry in evaluating "white bloc voting" is whether the "candidate is truly the minority community's representative of choice." Pet. App. 40a, 41a. The reasons for that choice do not matter.

Consistent with this view, the court of appeals refused to address the uncontested evidence presented by defendants that voting in the Red Clay District is attributable

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[6] As the Third Circuit recognized, there is a mature split among the circuits on this subsidiary question, which is fairly included in the questions presented in this petition. *See, e.g., Baird* v. *Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2334 (1993) (race of candidate important); *Carrollton Branch of the NAACP* v. *Stallings*, 829 F.2d 1547, 1557 (11th Cir. 1987), *cert. denied*, 485 U.S. 936 (1988) (race of candidate not important); *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 503-04 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989) (minority voter preference determined only from elections involving minority candidates); *Sanchez*, 875 at 1494-95 (yet another approach — the one adopted by the Third Circuit here). The Court's review is warranted to provide guidance on this important question.

to ideological preferences unrelated to prohibited racial discrimination. Specifically, since 1985 election results have not turned on the racial identity of candidates or voters, but upon their position with respect to the "feeder pattern" issue involving local school assignments and transportation. *See supra* at 7-8. Both black and white candidates were on both sides of this issue. Yet the court of appeals refused to address this fact. It also did not include evidence of non-racial reasons for the election outcomes in its description of matters that should properly be considered by district courts.

### B. The Fifth Circuit (and Half of the Eleventh) Has Expressly Held that Divergent Voting Patterns Not Attributable to Race Cannot Support a Section 2 Claim

In contrast to the Tenth Circuit in *Sanchez* and the Third Circuit here, the *en banc* Fifth Circuit has held that where non-racial partisan motivations best explain divergent voting patterns, there is no violation of section 2. *League of United Latin American Citizens* v. *Clements*, 999 F.2d 831 (5th Cir. 1993) ("*LULAC*"). As stated by the Fifth Circuit:

> Absent evidence that minorities have been excluded from the political process, a "lack of success at the polls" is not sufficient to trigger judicial intervention. Courts must undertake the additional inquiry into the reasons for, or causes of, these electoral losses in order to determine whether they were the product of "partisan politics" *or* "racial vote dilution," "political defeat" *or* "built-in bias." It is only upon concluding that a minority group's failure to prevail at the polls, that is, their failure to attract the support of white voters,

> was the "result" or "function" of "racial vote dilution" or "built-in bias," that a court may find that minority plaintiffs have suffered "a denial or abridgement of the right ... to vote on account of race or color."

*Id.* at 853-54; *see also Baird* v. *Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992), *cert. denied* 113 S. Ct. 2334 (1993) (discussing the competing approaches to section 2, and concluding that the statute "is a balm for racial minorities, not political ones — even though the two often coincide. *Whitcomb* v. *Chavis*, 403 U.S. 124, 153 (1971)").[7]

Unlike the Third Circuit here, the Fifth Circuit adopted the approach to section 2 taken by the five Justices who supported the *Gingles* opinions of Justices O'Connor and White. The court stated:

> The division in *Gingles* between the Brennan plurality and the five Justices who supported the White/O'Connor approach cuts deep, reflecting quite different visions of voting rights and their statutory treatment. Since these five Justices expressly rejected a test that would permit § 2 liability to attach upon a showing that white and black citizens generally gave their votes to different candidates in

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[7] A petition for certiorari is now pending in *LULAC*. *See* No. 93-630 (cert. petition filed October 21, 1993). While this case might appropriately be consolidated with *LULAC* for purposes of considering the voter motivation issue, this case has the advantage of providing a vehicle for guidance from the Court on the additional important voting rights questions discussed in this petition.

> favor of an inquiry into the possible explanations of these divergent voting patterns, we believe that it is this view, not Justice Brennan's, that commands our allegiance.

*Id.* at 857. The Fifth Circuit's approach to this issue is dispositive here, where uncontested evidence showed that Red Clay voters were motivated by their views on the "feeder pattern" issue, not by racial prejudice.

By calling for a thorough examination of the reasons for voting behavior, the Fifth Circuit (Justice O'Connor's) approach promotes a more intense examination of factors involving access to the political process and opportunity to participate in that process rather than focusing solely on results. *Cf. Chisom* v. *Roemer*, 111 S. Ct. 2354, 2365 (1991) (section 2 plaintiffs must show *both* an inability to elect candidates of their choice *and* less opportunity to "participate in the political process"). The distinction is critical in a case such as this one, where the record so clearly demonstrated that all of the factors involving minority access to political participation favored the defendants. *See supra* at 6 (discussing absence of barriers to participation such as registration requirements, inconvenient voting procedures, impediments to minority sponsorship of candidates, and the like in the Red Clay District).

As with the proportional representation issue, there is also half a conflict with Eleventh Circuit on the question whether section 2 requires an inquiry into voter motivation. Five of ten judges in the *en banc* consideration of the *Solomon* case adopted the view expressed by Judge Tjoflat that absent racial bias motivating the voting community, there is no section 2 violation. The other five joined Judge Kravitch in concluding that proving a non-racial motivation

for divergent voting patterns is no defense. *See Solomon* v. *Liberty County*, 899 F.2d 1012, 1016 n.3, 1035-36 (11th Cir. 1990); *Nipper* v. *Smith*, 1 F.3d 1171, 1182 (11th Cir. 1993) (noting continued division of circuit).

The analysis employed by the Third Circuit makes it impossible for that court to follow the Fifth Circuit's approach of examining voter motivation in addition to the *Gingles* factors. This is so because the Third Circuit follows an approach that makes proof of the three *Gingles* conditions tantamount to proof of a section 2 violation. The Third Circuit stated that "it would be a *highly unusual* case in which a plaintiff successfully proved the existence of the three *Gingles* factors and still failed to establish a violation." Pet. App. 17a (emphasis added). While the court of appeals acknowledged it could not "rule out that possibility entirely," later in its opinion the court reiterated that it would be "only the very unusual case" where proof of the *Gingles* factors was not proof of a violation. *Id.* at 17a, 64a. In the Eleventh Circuit, five judges share the Third Circuit's view that proof of the three *Gingles* suffices to prove a section 2 violation; five others disagree. *See Nipper*, 1 F.3d at 1178 n.11.

This brings the analysis full circle. As expressed by Judge Tjoflat:

> If all a plaintiff must ever do is prove the three *Gingles* factors, then all large, compact, and politically cohesive minority groups will have a de facto right to proportional representation. Whenever minority candidates are not succeeding in at-large elections, and whenever the minority is large and politically cohesive, the *only* explanation for the minority candi-

dates' lack of success would be white bloc voting.

*Solomon*, 899 F.2d at 1036 n. 13 (providing a mathematical example, and concluding that such a "de facto proportional representation" interpretation of section 2 risks calling the statute's constitutionality into question). The Court's attention is warranted to resolve these important voting rights issues.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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November 17, 1993

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# APPENDIX

Filed August 19, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 92-7025

---

ALDEN JENKINS; HARLAN ROBERTS;
GWENDOLYN NEAL,

v.

RED CLAY CONSOLIDATED SCHOOL DISTRICT
BOARD OF EDUCATION; DAVID C. ALLEN;
CHARLES M. CAVANAUGH; RICHARD P.
ECKMAN; SUSAN A. MATHE; SHERILYNN
JACKSON; WILLIAM E. MANNING; PATRICIA
REINBOLD; CAROL SCOTTON; IRWIN BECNEL

Alden Jenkins; Harlan Roberts; Gwendolyn Neal, acting on behalf of themselves and all others similarly situated,

Appellants

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On Appeal From the United States District Court
for the District of Delaware

(D.C. Civil No. 89-00230)

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Argued: July 29, 1992

Before: BECKER, MANSMANN and NYGAARD,
*Circuit Judges*

(Filed August 19, 1993)

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## OPINION OF THE COURT

BECKER, *Circuit Judge.*

This appeal arises from a class action challenge brought pursuant to § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973 (1988) ("the Act"), to the at-large scheme for electing members of the school board for the Red Clay Consolidated School District in Delaware. The three named plaintiffs, Alden Jenkins, Harlan Roberts, and Gwendolyn Neal, brought the action on behalf of all eligible black voters in the district. They allege that the current method of electing the Red Clay Board of Education unlawfully dilutes the voting strength of the black citizens of Red Clay, thereby depriving them of an equal opportunity "to participate in the political process and to elect representatives of their choice," 42 U.S.C. § 1973(b). The plaintiffs seek declaratory and injunctive relief barring the use of the present at-large voting system, and mandatory injunctive relief establishing an alternative, non-discriminatory system for future elections. The defendants are the Red Clay Board of Education and the individual members of the Board in their official capacities. Following a bench trial, the district court found that the plaintiffs had failed to prove a § 2 violation, and therefore entered judgment for the defendants. *See Jenkins v. Red Clay Consolidated School Dist. Bd. of Educ.*, 780 F. Supp. 221 (D. Del. 1991). Plaintiffs' appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

In *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986), the Supreme Court established three preconditions (the "*Gingles* factors") to a finding that the dilutive

effects of a multimember district violated § 2. We focus here predominately on the third *Gingles* factor, "that the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances ... — usually to defeat the minority's preferred candidate," *id.* at 50-51, 106 S. Ct. at 2766-67, because we have determined that it is dispositive of this appeal.

We conclude that the district court committed reversible error with respect to the third *Gingles* factor by relying on the *potential* for black voters to elect their representatives of choice with a plurality of the vote (as is permitted under the Red Clay voting scheme), when the record demonstrated that no Red Clay candidate had won with a mere plurality since 1981. The district court thus erred in failing to ground its analysis in the actual, rather than the potential, effect that the plurality voting scheme had on the ability of black Red Clay voters fully to participate in the political process and to elect their representatives of choice. Concluding also that the judgment cannot be affirmed on alternative grounds, we will reverse and remand for further proceedings, and suggest that the district court receive additional evidence on remand.

## I. FACTUAL BACKGROUND

The Red Clay Consolidated School District was established by the Delaware State Board of Education in November of 1980, pursuant to the authority of 62 Del. Law Ch. 351. The creation of the district was approved by the United States District Court for the District of Delaware, *Evans v. Buchanan,* 512 F. Supp. 839 (D. Del. 1981), as part of its ongoing oversight of the desegregation of the Delaware public school system. Red Clay combines a portion of the city of Wilmington with certain of its suburbs

in New Castle County. While Wilmington as a whole has a black majority population, the portion of Wilmington included in the Red Clay School District has a white majority, as do the suburban portions of the district. In sum, according to 1990 census figures, the Red Clay School District has a total population of 132,674, with a total black population of 19,252 or 14.51%. The total voting age population is 102,196, of whom 13,257, or 12.97%, are black.

The School Board has seven members, each of whom normally serves a term of five years.[1/] Each Board Member must be a resident of a different nominating district (denoted A-G), and must run for the seat associated with that nominating district. Elections are staggered so that only one or two seats are up for election each May. Beyond the residency requirement, the only requirement for becoming a candidate is to submit a petition signed by twenty eligible district voters. Elections are conducted on an at-large, nonpartisan basis. Voters may vote at any polling place in the district, and they may vote for a single candidate running for each of the seats up for election in that year. There is no voter registration; any resident of the district who is at least eighteen years of age may vote. The candidate who receives at least a plurality of the votes for a particular seat is elected.

In 1981, when the first elections were conducted under the reformulated Red Clay School District scheme,

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[1/] Although the normal term is five years, for a variety of reasons not all Board Members have actually served for five years. As a relevant example, Ronald Greene, who is one of the three black candidates elected to the Red Clay School Board, was elected only to complete the final year of a regular five year term.

elections were held for six of the seven School Board seats.[2/] For the district B seat, a black candidate, Harlan Roberts, was elected over five white candidates. Two other black candidates, William Anderson from district A and Gregory Connor from district E, also sought seats on the Board, but were defeated. All other candidates were white.

In 1982, two seats were up for election. Two white candidates ran for the seat in district C, and the white incumbent ran unopposed for the seat in district G.

In 1983, a black and white candidate vied for the seat in district A. Similarly, the seat from district D was contested by a black and a white candidate. Both of these elections were won by the white candidates.

In 1984, three white candidates ran for the seat in district D, and two white candidates ran for the seat in district E.

In 1985, incumbent black candidate Roberts was defeated by a white candidate for the seat in district B. Additionally, the incumbent white candidate ran unopposed for the seat in district G.

In 1986, a white candidate was appointed to fill the seat in district C. Three white candidates ran for the seat in district F.

In 1987, the only election was for the seat in district C, in which there were four white candidates.

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[2/] The Board member from the seventh nominating district (district G) was an appointed candidate who was white.

In 1988, a black candidate ran against two white candidates for the seat in district A. The seat was won by one of the white candidates. Additionally, an incumbent white candidate ran unopposed for the seat in district D.

In 1989, two white candidates ran for the seat in district E, the sole seat up for election.

In 1990, two black candidates, Carol Scotton and Rita Shockley, ran against each other for the seat in district B. Scotton was elected. Two white candidates ran against each other for the seat in district G.

In 1991, a black and a white candidate ran for the seat in district C, with the black candidate, Ronald Greene, winning. Two white candidates ran for the seat in district F. The 1991 election occurred after the trial. Neither party attempted to reopen the record to introduce evidence about the election, but the district court took judicial notice of the results.

In sum, in the period between 1981 and 1991, twenty-five vacant seats on the Red Clay School Board were filled. Twenty of these were filled through contested elections; three through uncontested races; and two were appointed. Ten black candidates ran in nine separate contested elections (the 1990 election for the seat in district B involved two black candidates running against each other).[3/] Black candidates were elected in three of those races: Roberts in 1981, Scotton in 1990, and Greene in 1991. In contrast, sixty-five white candidates have sought

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[3/] A black candidate has never run unopposed or been appointed, and the 1990 election for the seat in district B was the only election in which there was no white candidate.

twenty-four separate seats, including two seats that were appointed and three instances in which a white candidate ran unopposed. A white candidate ended up filling those seats on twenty-two of the twenty-four occasions.

## II. SECTION 2 OF THE VOTING RIGHTS ACT

Section 2 of the Voting Rights Act, as amended, establishes that

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . .

42 U.S.C. § 1973(a).[4]

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[4] In full, § 2 provides:

> **Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**
>
> (a) No voting qualification or prerequisite to voting or standard, practice, procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(continued...)

In 1980, the Supreme Court interpreted § 2 to require a plaintiff to prove discriminatory intent in the design or maintenance of the challenged scheme in order to establish a violation. *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490 (1980) (plurality opinion). Responding to *Bolden*, Congress in 1982 amended § 2 to make clear that a violation could be proved by showing a discriminatory *effect* and to establish that the "results test" that had been applied by the courts before *Bolden* was the appropriate legal standard. *See Thornburg v. Gingles*, 478 U.S. 30, 35, 106 S. Ct. 2752, 2758 (1986).

In particular, Congress added the following provision setting out the general framework for proving a violating of § 2:

> A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political

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[4] (...continued)

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphasis in original).

> processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b).

Under this "totality of circumstances" analysis, the courts are to consider a wide variety of factors. To aid the analysis, the Senate Report accompanying amended § 2 set out a number of typical factors, which we refer to as "the Senate Factors." *See* S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S.C.C.A.N. 117, 206-07.[2] "[T]here is no requirement that any particular number

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[2] The Senate Report states:

> If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this section. To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question.

(continued...)

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2/ (...continued)

Typical factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

(continued...)

of factors be proved, or that a majority of them point one way or the other." *Id.* at 29, *reprinted in* 1982 U.S.C.C.A.N. at 207. "Rather, the Committee determined that the

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[9] (...continued)

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.
>
> While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.
>
> The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.

S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S.C.C.A.N. 117, 206-07 (footnotes omitted). The report further states:

> The courts ordinarily have not used these factors, nor does the Committee intend them to be used, as a mechanical "point counting" device. The failure of plaintiff to establish any particular factor, is not rebuttal evidence of non-dilution. Rather, the provision requires the court's overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson [v. Dorsey,* 379 U.S. 433, 85 S. Ct. 498 (1965),] and *Burns [v. Richardson,* 384 U.S. 73, 86 S. Ct. 1286 (1966)], "minimized or canceled out."

*Id.* at 29 n.118, *reprinted in* 1982 U.S.C.C.A.N. at 207 n.118.

question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality and on a functional view of the political process." *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2763-64 (internal quotation and citation omitted).

In *Gingles*, the Court was presented with its first post-amendment § 2 challenge to a voting scheme. There, a class of all registered black citizens of North Carolina challenged the composition of seven state legislative districts established by a 1982 act of the North Carolina General Assembly that redistricted the state for elections of North Carolina's bicameral legislature. *See Gingles v. Edmisten*, 590 F. Supp. 345, 349-50 (E.D.N.C. 1984) (three judge court). The plaintiffs alleged that in six of these seven districts the redistricting "plan impermissibly dilute[d] the voting strength of the state's registered black voters by submerging black voting minorities in multi-member" districts. *Id.* at 349.

In evaluating the plaintiffs' challenge, the Supreme Court explained: "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47, 106 S. Ct. at 2764. As a gloss on the totality of the circumstances analysis of § 2, the Court set out three factors which it held to be "necessary preconditions" for a finding that multi-member districts "operate to impair minority voters' ability to elect representatives of their choice": (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group must be able to show that it is politically cohesive"; and (3) "the minority must be able to demonstrate that the white majority

votes sufficiently as a bloc to enable it — in the absence of special circumstances . . . — usually to defeat the minority's preferred candidate." *Id.* at 50-51, 106 S. Ct. at 2766-67.

The *Gingles* factors, however, are merely threshold considerations. The ultimate determination under § 2 remains whether, under the totality of the circumstances, "the multimember districting scheme at issue in this case deprived black voters of an equal opportunity to participate in the political process and to elect representatives of their choice." *Id.* at 77; 106 S. Ct. at 2780; *see also* S. Rep. at 30, *reprinted in* 1982 U.S.C.C.A.N. at 207. Therefore, even after a court has determined that the plaintiffs proved each of the *Gingles* factors, it must go on to consider whether the totality of circumstances, evaluated under "a searching practical evaluation of the 'past and present reality'" and a "functional view of 'political process,'" establishes that the particular voting scheme diminishes the minority group's opportunity fully to participate in the political process. S. Rep. at 30 & n.120 *reprinted in* 1982 U.S.C.C.A.N. at 208 & n.120 (citation omitted); *see Westwego Citizens for Better Gov't v. City of Westwego,* 872 F.2d 1201, 1206 (5th Cir. 1989) (*Westwego I*) ("The final determination, however, must be made by an evaluation of the 'totality of the circumstances,' including the factors listed in the Senate Report."); *see also Gingles,* 478 U.S. at 79, 106 S. Ct. at 2781.[6]

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[6] This is not to suggest that there is some specific, additional proof necessary for a plaintiff to prevail. Although a court's evaluation of the totality of the circumstances requires consideration of all the Senate Factors, the Court stated:

> Under a "functional" view of the political process mandated by § 2, the most important Senate Report factors

(continued...)

We will elaborate further on the *Gingles* factors in our discussion of the merits.

## III. STANDARD OF REVIEW

The Supreme Court's opinion in *Gingles* includes specific guidance on the proper standard of appellate review in cases under the Voting Rights Act. The parties in *Gingles* argued that the district court's ultimate determination as to vote dilution constituted a mixed question of law and fact subject to de novo review. The Court, however, referencing the particularly local and fact-intensive nature of the inquiry, reaffirmed its view in prior voting cases "that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." *Gingles*, 478 U.S. at 77-79, 106 S. Ct. at 2780-81; *see also id.* at 78, 106 S. Ct. at 2781 ("'we are not inclined to overturn these findings [that minority voters had less opportunity to

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6/ (...continued)

> bearing on § 2 challenges to multimember districts are the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political subdivision is racially polarized [issues directly addressed by *Gingles* factors 2 and 3]. If present, the other factors, ..., are supportive of, but *not essential to*, a minority voter's claim.

*Gingles*, 478 U.S. at 48 n.15, 106 S. Ct. at 2765 n.15 (emphasis in original; citation omitted). The ultimate determination that a plaintiff has proved a violation of § 2, nevertheless, must be made by the district court in light of *all* the circumstances. While it would be a highly unusual case in which a plaintiff successfully proved the existence of the three *Gingles* factors and still failed to establish a violation, we cannot rule out that possibility entirely. *See Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3771 (U.S. May 17, 1993) (No. 92-1415).

participate in the political process], representing as they do a blend of history and an intensely local appraisal of the design and impact of the ... multimember district in the light of past and present reality, political and otherwise.'") (quoting *White v. Register*, 412 U.S. 755, 769-70, 93 S. Ct. 2332, 2341 (1973)). The Court further explained:

> As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,'" whether the political process is equally open to minority voters. "'This determination is peculiarly dependent upon the facts of each case,'" and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms.

*Id.* at 79, 106 S. Ct. at 2781 (citation omitted).

In light of the Court's attention to the superior vantage point of the district courts, we conclude that the various subsidiary findings in a voting rights case, such as the court's findings on each of the three *Gingles* factors and on the various Senate Factors, are also factual determinations subject to clearly erroneous review. *See, e.g., Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1118 n.13 (5th Cir. 1991) (*Westwego III*).

The Rule 52(a) standard does not, however, give a district court unfettered discretion in evaluating a claim. While the Court in *Gingles* emphasized the deference due district court fact findings, it also recognized that

> Rule 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law."

*Gingles*, 478 U.S. at 79, 106 S. Ct. at 2781 (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501, 104 S. Ct. 1949, 1960 (1984)). This result is clearly necessary since both the ultimate determination of vote dilution and the accompanying subsidiary determinations often depend on important legal questions. Accordingly, we must subject the district court's underlying legal analysis to plenary review to ensure that the appropriate legal standards are applied. As the Court concluded, it is this combination of factual deference and legal review that best "preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Id.* at 79, 106 S. Ct. at 2781.

## IV. THE DISTRICT COURT'S OPINION

Following a six day bench trial, the district court filed an extensive opinion denying the plaintiffs' claims under § 2 of the Voting Rights Act, 42 U.S.C. § 1973. *Jenkins v. Red Clay Consolidated School Dist. Bd. of Educ.*, 780 F. Supp. 221 (D. Del. 1991). The court began its analysis by considering the extent of black electoral success.[2/] *Id.* at 224-26. Recognizing that "black citizens have achieved some electoral success in the District," the court

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[2/] The Supreme Court has said that persistent proportional representation is presumptively inconsistent with the existence of a § 2 violation. *Gingles*, 478 U.S. at 77, 106 S. Ct. at 2780 (opinion by Brennan, J.); *id.* at 102, 106 S. Ct. at 2793 (O'Connor, J., concurring in the judgment); *see also infra* Part V.C.

nevertheless concluded that because there also had been some under-representation and because some of the success may have resulted from unusual circumstances, it would "proceed to consider the *Gingles* threshold factors." *Id.* at 226.

The district court concluded that the first *Gingles* factor was satisfied. In particular, the court found that if the school district was divided into single member districts, a majority black district could be created. *Id.* As to the second factor, after discussing the evidence on the issue, the court determined that the black voters in the Red Clay School District usually were politically cohesive. *Id.* at 231. The court stressed, however, that while it believed that the plaintiffs had managed to prove political cohesiveness, the evidence supporting this finding was "generally weak." *Id.*

With regard to the third *Gingles* factor, the district court concluded that the plaintiffs had failed to establish the existence of white bloc voting because their statistical evidence either was not probative or failed to show a *pattern* of white bloc voting that usually defeated the black voters' candidate of choice. *Id.* at 231-32. In the court's view, the most relevant evidence, because it covered a wider number of elections than the plaintiffs' other statistical evidence, arguably was the plaintiffs' calculation of the theoretical maximum white vote that the various black candidates could have received. These calculations demonstrated that in the overwhelming number of elections a substantial majority of white voters voted against the minority-preferred candidate. The court found this evidence unpersuasive, however, concluding that the fact that white voters usually vote sufficiently as a bloc against the black candidate, thereby preventing that candidate from receiving a *majority* of the votes, is insufficient to prove the existence of legally significant white bloc voting because minority-preferred

candidates could still be elected by winning a *plurality* of the votes in multi-candidate elections. *Id.* at 233. We refer to this as the district court's "plurality-win" theory.

The court also found that, because the theoretical maximum white vote for black candidates ranged from nine to fifty-nine percent, there was not "a consistent pattern of whites voting against the black candidate." *Id.* Finally, the court expressed doubt "that all of these black candidates were the preferred candidates of the black community." *Id.*

Having found that the plaintiffs established only two of the three *Gingles* factors, the district court concluded that the plaintiffs' claim must fail. *Id.* Nevertheless, for the sake of providing a comprehensive opinion, the court went on to address the Senate Factors, and found, albeit in a conclusory fashion, that the plaintiffs had failed to establish a violation of § 2 under the totality of the circumstances. *Id.* at 233-41. We will discuss the district court's opinion in more detail in the course of the merits discussion that follows.

## V. THE MERITS

### A. INTRODUCTION

It is undisputed that voting age blacks in the Red Clay School District constitute a group "sufficiently large and geographically compact to constitute a majority in a single-member district." *See Gingles,* 478 U.S. at 50, 106 S. Ct. at 2766. This is, however, essentially the only issue about which the parties agree.

The plaintiffs' primary argument on appeal is that the district court committed reversible legal error in its consideration of whether the plaintiffs proved that white voters vote

sufficiently as a bloc usually to defeat the preferred candidate of the minority community. The plaintiffs argue that the district court's reliance on the *potential* for minority-preferred candidates to win with a plurality, thereby overcoming the majority opposition of white voters, was contrary to the standard for legally significant white bloc voting announced by the Supreme Court in *Gingles*.

In response, the defendants argue that the district court was correct that the potential to win with a plurality offsets the effect of showing that black voters do not receive substantial support from white voters. In the alternative, the defendants contend that, even if the district court did err, its ultimate judgment was nevertheless correct. The defendants' primary alternative argument for upholding the judgment is that the plaintiffs' evidence was insufficient to establish which candidates were minority-preferred. This is fatal to the plaintiffs' claim, the defendants argue, because to show legally significant white bloc voting the plaintiffs must establish that there is a *pattern* of whites voting sufficiently as a bloc usually to defeat the minority-preferred candidate, which can only be determined by the court if it knows who the minority-preferred candidates were in a sufficient number of elections to establish a pattern.

The defendants offer three additional arguments for upholding the judgment: (1) that the black voters of Red Clay have achieved sufficient proportional representation to bar a § 2 claim; (2) that the plaintiffs' evidence on the second *Gingles* factor — that the black voters of Red Clay are politically cohesive — was too infirm to prove the factor's existence; and (3) that the court's ultimate conclusion that the plaintiffs' claim failed under the totality of the circumstances was proper and should be affirmed regardless of any other errors.

## B. WHITE BLOC VOTING

Under the third *Gingles* factor, plaintiffs must show "that the white, majority votes sufficiently as a bloc to enable it — in the absence of special circumstances ... — usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S. Ct. at 2766-67. With regard to white bloc voting, we will treat two primary issues. First, we will discuss whether the district court's plurality-win theory is consistent with the Supreme Court's standard for legally significant white bloc voting. Second, having concluded that the district court erred on this point, we will discuss which candidates were minority-preferred and whether the plaintiffs have carried their burden of analyzing a sufficient number of elections to permit the court to determine whether there was legally significant white bloc voting.

### 1. The Supreme Court Standard

In elaborating on the *degree* of bloc voting that plaintiffs must show to establish the third *Gingles* factor, the Supreme Court concluded that "there is no simple doctrinal test for the existence of legally significant racial bloc voting." *Id.* at 58, 106 S. Ct. at 2770. The Court, however, did set out the following general principles for determining whether legally significant white bloc voting exists:

> [I]n general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting. The amount of white bloc voting that can generally "minimize or cancel" black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors....

> Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial block voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election. Also for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting.

*Id.* at 56-57, 106 S. Ct. at 2769-70 (citations and footnotes omitted).

2. The Plaintiffs' Evidence Of White Bloc Voting

In attempting to establish the existence of legally significant white bloc voting, the plaintiffs introduced expert testimony, which included statistical analyses of a number of both Red Clay elections and exogenous elections (i.e., elections other than those in the Red Clay School District), lay testimony, and evidence of the results of past Red Clay School Board elections. The evidence established that black candidates were involved in nine of the twenty-three elections occurring between 1981 and 1991,[8/] including the post-trial 1991 election.

A black candidate won three of the nine elections in which black candidates were involved. These were the 1981 district B race in which Roberts was elected; the 1990

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[8/] In two additional instances the board members were appointed rather than elected. Both of these board members were white.

district B race in which Scotton was elected; and the 1991 district C race in which Greene was elected. However, as to the two black candidates elected before 1991, the plaintiffs claim that the court should have disregarded the results of those elections because the candidates were elected under "special circumstances," namely, that Roberts was able to win in 1981 only because the five white candidates against whom he ran split the white vote, and that Scotton was elected in 1990 because of the pendency of the present litigation.[9] Moreover, with regard to the 1991 election, the plaintiffs claim that because there was no evidence introduced about the circumstances surrounding that election, it cannot be considered.

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[9] The district court considered the existence of special circumstances in its initial evaluation of whether the black voters of Red Clay had achieved sustained proportional representation. *See infra* Part V.B. The court, however, never applied these findings, or addressed the existence or effect of special circumstances, in its analysis of white bloc voting, even though consideration of special circumstances is specifically mandated within the definition of the third *Gingles* factor: "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – *in the absence of special circumstances, ...* – usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S. Ct. at 2766-67 (emphasis added).

Because the district court never addressed the existence of special circumstances in the context of white bloc voting and because we conclude that the plaintiffs' evidence would have been sufficient to support a finding in its favor on white bloc voting irrespective of the existence of special circumstances, *see infra* typescript at [42], we express no opinion on the relationship between the consideration of special circumstances in the two contexts (proportional representation and white bloc voting) or on the legal effect of a finding of special circumstances on a court's analysis of white bloc voting. On remand, however, the district court will need to address these issues in order properly to evaluate the effect of whatever success minority-preferred candidates have achieved on the existence of legally significant white block voting.

The plaintiffs also introduced lay testimony and expert statistical evidence on the voting patterns of both black and white Red Clay voters. The plaintiffs' expert, Dr. Allan Lichtman, performed bivariate regression analysis[10/] on the 1988 Red Clay School Board election between Mitchell, a black candidate, and two white candidates. According to Dr. Lichtman's regression analysis, only approximately 1% of the white voters voted for Mitchell, whereas virtually 100% of the black voters supported him. Additionally, Dr. Lichtman's analysis found a correlation coefficient for this election of 0.91, which represents a highly consistent association between the number of votes received by a candidate of a particular race and the racial composition of the polling place.[11/] *See Jenkins*, 780 F.

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[10/] Bivariate regression analysis is used to determine the degree of relationship between two variables – here the relationship between the racial composition in each political unit (the independent variable) and the support provided a particular candidate within that political unit (the dependent variable). *See* Richard L. Engstrom & Michael D. McDonald, *Qualitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 Urb. Law. 369, 374 (Summ. 1985). From an analysis of the regression equation (generally $Y = a + bx$), the plaintiffs' expert was able to estimate the percentage of blacks and whites who voted for the particular candidates. Additionally, Dr. Lichtman derived a correlation coefficient, here denoted as R, which measures "how consistently" the dependent variable varies in correspondence with the independent variable. The correlation coefficient's values "can range from +1.0 (a perfectly consistent positive relationship) through 0.0 (no relationship) to -1.0 (a perfectly consistent negative relationship)." *Id.* at 375.

[11/] The 1988 election was the only Red Clay election involving black and white candidates that Lichtman was able to analyze through regression analysis. Because Red Clay voters may vote at any polling place within the district, the only means to determine the racial composition of the electorate at a particular polling place is by reference to the

(continued...)

Supp. at 227. The plaintiffs also introduced the results of the extreme case analysis[12] done by Dr. Lichtman on the 1983, 1985, and 1988 elections involving black and white candidates.[13] Additionally, the plaintiffs provided extreme case, regression, and scatter point[14] analyses for a number of exogenous elections.

Finally, Dr. Lichtman calculated the maximum percentage of the white vote that the various black candidates *theoretically* could have received in the elections through

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[11] (...continued)
voters' place of residence, which can be obtained only from the sign-in lists for those polling places. The sign-in lists, however, are destroyed after two or three years. Since the present result was initiated in May of 1989, the only election involving white and black candidates for which the sign-in lists were available was the 1988 election (no black candidates ran in either 1986 or 1987). *See Jenkins*, 780 F. Supp. at 227.

[12] Extreme case analysis examines the actual voting percentages received by candidates in the most heavily white or most heavily black polling places. Because actual information on the racial composition of the polling places was unavailable for the 1983 and 1985 elections, the plaintiffs' expert had to assume that the polling places that were "homogenous" (those with at least 90% white voters) in 1988 were also "homogenous" in 1983 and 1985. *See Jenkins*, 780 F. Supp. at 232.

[13] Dr. Lichtman's analysis revealed that the black candidate received the following percentages of the vote in homogenous (90+ %) white polling places: 1988–4%; 1985–38%; 1983 District A–16%; and 1983 District D–15%. *See Jenkins*, 780 F. Supp. at 232.

[14] Scatter point analysis consists of plotting the percentage of votes received by a candidate as a function of the percentage of voters in a district that are of a particular race. Plotting the results on a graph is a simple method for determining whether the percentage of votes received by a candidate consistently increases or decreases as the percentage of white voters in the district increases. *See Jenkins*, 780 F. Supp. at 229-30.

1988. Using the actual vote totals received by the black candidates, and assuming, for the sake of analysis, that all of the votes they received were cast by white voters, Lichtman calculated the maximum possible percentage of white voters who could have voted for the black candidates under either equal white and black turnout, or, alternative, a black voter turnout rate twice that of white voters.[15] Assuming equal turnout rates, the theoretical maximum white vote for black candidates ranged from a low of 9% to a high of 53%. The average theoretical maximum white vote for the black candidates in the seven elections was approximately 28%.

The calculation of the theoretical maximum white vote for black candidates took on importance in the present case because of the plaintiffs' inability to obtain the underlying data necessary to determine actual voting patterns, *see supra* n.[11]. While the plaintiffs could not establish the actual voting pattern of white voters, the theoretical maximum white vote calculations allowed the plaintiffs to demonstrate the level of white bloc voting that must have existed. The analysis shows that none of the black candidates through 1988 received a majority of the white vote.

While the analysis suggests that it was *theoretically* possible for Roberts to have received 53% of the white vote, realistically, because Roberts received a substantial portion of the black vote, the actual percentage of white voters who voted for Roberts was well below 53%. More generally, because of the very conservative assumptions used to make the calculations — that no black voted for the black candidate

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[15] In fact, the turnout rate for black voters in Delaware tends to be below that of white voters, as it was in the 1988 Red Clay election. *See Jenkins*, 780 F. Supp. at 234. The actual turnout by race in prior elections, however, could not be determined for the reasons explained, *supra* n.[11].

and that there was an equal turnout[16] — the average percentage of white voters who voted for particular black candidates was substantially lower than the 28% suggested by the analysis. The calculations therefore served to demonstrate that generally a black candidate could prevail only if the white vote was split among a number of white candidates, thereby allowing the black candidate to prevail with a plurality of the vote.

3. The District Court's Evaluation of the Plaintiffs' Evidence

In evaluating whether there was white bloc voting, the court first addressed the plaintiffs' evidence on the exogenous elections. The court rejected this evidence on the ground that the plaintiffs had failed to prove that the exogenous elections were "representative of the voting patterns of the white Red Clay electorate" because "less than 21 percent of the white Red Clay electorate were eligible to vote in those [exogenous] elections" and because "the exogenous elections generally covered districts within the city of Wilmington [whereas] most of the white Red Clay electorate lives in the suburban areas of the District." *Jenkins*, 780 F. Supp. at 231.

One exogenous election did include a majority of the white voters from the Red Clay School District, but the court also found the evidence of that election unhelpful because the predominately black districts in that election were outside of

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[16] These assumptions are not just conservative but are counter-factual. The record demonstrated that most, if not all of these candidates, were the preferred candidates of the black voters, *see infra* Part V.B.5.b., and rather than equal turnout, the turnout rate for black voters tends in Delaware to be lower than the turnout rate for white voters, *see supra* n.[15].

the Red Clay School District. The court concluded that there was no indication that the candidate supported by the majority black districts outside Red Clay would have been the "minority-preferred" candidate of the black Red Clay voters had the election taken place in Red Clay. *Id.* at 232.

As to the expert evidence on the Red Clay elections, the court first addressed the regression analysis of the 1988 Mitchell-Nuttal-Manning election. While the court credited the plaintiffs' regression analysis, it concluded that that evidence, standing along, was insufficient because the results of a single election could not establish a *pattern* of white bloc voting. *Id.* at 231. Turning to the plaintiffs' extreme case analysis, the district court again credited their analysis of the 1988 election. Because of the lack of data, however, Lichtman had been forced to assume that the proportion of white voters at the various polling places were the same in 1983 and 1985 as they had been in 1988 and 1989. The district court found that this assumption was unsupportable because there was "no substantial evidence that the racial composition of those districts had not changed . . . . [or] that the turnout by race was the same ...." *Id.* at 232.

Finally, the district court addressed what was the plaintiffs' broadest statistical evidence, their calculations of the theoretical maximum white votes that each of the black candidates could have received:

> The Court notes that a candidate need not receive 50 percent of the white vote to win an election in Red Clay when more than two candidates are running for a seat. Therefore, a finding of white bloc voting cannot be based upon the observation that usually less than 50 percent of the white [voters] favor the black candidate. Assuming equal turnout of

> black and white voters, the white vote for the black candidate ranged from a low of 9 percent to a high of 53 percent. The Court finds that these varied results do not indicate a consistent pattern of whites voting against the black candidate. Furthermore, the Court is not convinced that all of these black candidates were the preferred candidates of the black community. The Voting Rights Act is designed to protect the minority voter not the minority candidate. Only the 1988 election has received extensive analysis by the experts. The lay testimony regarding the 1983 elections is contradictory.

*Id.* at 233.

In sum, the district court concluded that the plaintiffs had failed to produce relevant proof sufficient to establish, by a preponderance of the evidence, a pattern of white bloc voting that usually would defeat the black Red Clay voters' candidate of choice.

4. Validity of the District Court's Plurality-Win Theory

The plaintiffs' principal argument on appeal is that the district court committed legal error in reasoning that, because candidates can win elections in Red Clay with a plurality of the votes, proof that minority-preferred candidates routinely receive less than a majority of the votes does not tend to establish the third *Gingles* factor — legally significant white bloc voting. The plaintiffs argue that the district court's plurality-win theory, because it focuses on the theoretical potential to elect minority-preferred candidates rather than on the functional reality that the plurality voting scheme has not generally had the *effect* of facilitating the

election of minority-preferred candidates, contradicts the *Gingles* definition of what is legally significant white block voting. We agree.

We do not gainsay that the ability to elect a candidate with a plurality of the vote may be relevant to the court's determination of white bloc voting. In *Gingles*, the Supreme Court adopted a practical, results oriented approach, specifically noting that "[t]he amount of white bloc voting that can generally 'minimize or cancel' black voters' ability to elect representatives of their choice ... will vary from district to district according to a number of factors, including . . . the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements . . . ." *Id.* at 56, 106 S. Ct. at 2769 (citation omitted). If minority-preferred candidates are consistently able to prevail in representative numbers because of the existence of a plurality rule, then it cannot be said that white voters vote sufficiently as a bloc usually to prevent the election of the minority preferred candidates. *See id.* at 51; 106 S. Ct. at 2767 ("In establishing [the third *Gingles* factor], the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives."). The focus of the third *Gingles* factor is not on the size of the bloc, per se, but the *effect* of bloc voting on the ability of minority voters fully to participate in the political process and to elect their representatives of choice.

The district court, therefore, did not err in considering the existence of a plurality rule. Rather, the court's error occurred in analyzing the effect of the rule in terms of whether it created *any* set of circumstances whereby black candidates might theoretically prevail. The Senate Report repeatedly emphasizes that the court must evaluate plaintiffs' claims under "a searching practical evaluation of the past and present reality and on a functional view of the political

process." *Id.* at 45, 106 S. Ct. at 2764 (internal quotation and citation omitted; quoting Senate Report at 30 & n.120 *reprinted in* 1982 U.S.C.C.A.N. at 208 & n.120). We believe, therefore, that the proper question is not whether the existence of a plurality regime makes it possible for black candidates to prevail, but whether it in fact has had the practical effect of allowing more than sporadic victories by minority-preferred candidates.

The district court's reasoning in regard to its plurality-win theory is not unambiguous, and it is possible that the court in fact understood the proper legal standard. However, if the court applied the correct legal standard, its conclusion that Red Clay's plurality rule made it such that white bloc voting did not usually cause minority-preferred candidates to lose was clearly erroneous. While it is true that one black candidate, Roberts, was able to prevail in 1981 because of the existence of the plurality rule (running against five white candidates), as a practical matter, this was a rare occurrence in Red Clay elections. The record demonstrates that no candidate, black or white, was elected to the Red Clay Board of Education with a mere plurality of the votes since 1981; moreover, since 1981, rarely have more than three candidates vied for a single seat,[17] and only one post-1981 elections involving a black candidate also involved more than one other candidate.

Whether the error here was factual or legal makes no practical difference. The basic concern addressed by the third *Gingles* factor is whether or not white bloc voting usually defeats the minority-preferred candidate. The existence of a single instance in which a black candidate was elected with a plurality of the votes would not be sufficient

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[17] Only one post-1981 election has involved more than three candidates.

to alter an otherwise supportable conclusion that white voters vote sufficiently as a bloc usually to defeat the minority-preferred candidate. While the district court's findings are due significantly deference, *see supra* Part III., where, as here, they reflect a misunderstanding of an essential legal component of the inquiry or a misapprehension of the relevant legal facts, the findings cannot stand. *See Gingles*, 478 U.S. at 79, 106 S. Ct. at 2781.

The district court also pointed to the variations in the theoretical maximum level of white votes black candidates could have received and found "that these varied results do not indicate a consistent pattern of whites voting against the black candidate," *Jenkins*, 780 F. Supp. at 233, apparently assuming that *Gingles* requires a consistent level of hostility towards minority-preferred candidates. We believe that this conclusion suffers from a similar legal infirmity.

*Gingles* does not require a showing that white voters vote as an unbending monolithic block against whomever happens to be the minority's preferred candidate. To the contrary, the *Gingles* standard presupposes the existence of crossover voting. *See Gingles*, 478 U.S. at 56, 106 S. Ct. at 2769 (defining legally significant white bloc voting as "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes"). Moreover, the standard in *Gingles* necessarily presupposes variations in the levels of crossover voting from election to election. The Court specifically stated:

> [I]n a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting.

*Id.* at 57, 106 S. Ct. at 2770. The correct question is not whether white voters demonstrate an unbending or unalterable hostility to whomever may be the minority group's representative of choice, but whether, as a practical matter, the usual result of the bloc voting that exists is the defeat of the minority-preferred candidate.

In short, we conclude that the district court erred in focusing on the potential for Red Clay's plurality scheme to aid minority-preferred candidates rather than on the practical effects which that scheme actually has had. Since no candidate, black or white, has won with a mere plurality since 1981, and only one black candidate has run in an election against more than a single opposing candidate since 1981, the court could not have concluded on this record that the plurality scheme had the actual effect of allowing the black voters of Red Clay to elect their representatives of choice even though the white voters consistently voted against the minority-preferred candidates in numbers sufficient to prevent those candidates from winning a majority of the overall vote.

We have no way of knowing what conclusions the district court would have arrived at in regards to white bloc voting had it not been laboring under its misperception as to the significance of Red Clay's plurality voting scheme. Thus, unless the defendants can prevail in their contentions as to alternate bases for affirming the judgment, we must reverse and remand the case to allow the district court to address white bloc voting in light of this opinion.[18/]

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[18/] Because we believe that the district court's error in evaluating the significance of a candidate's ability to win an election in Red Clay with a plurality of the vote necessitates our reversing the court's finding on white bloc voting and remanding for further consideration of the issue,

(continued...)

5. Black Voters' Candidates of Choice

a. Introduction

The defendants' principal argument on appeal is that the plaintiffs' failed to come forward with sufficient proof to establish which candidates, over all the elections, were the candidates of choice among the black voters of Red Clay. This is fatal, the defendants submit, because to establish the third *Gingles* factor a plaintiff must show a pattern of white bloc voting such that the minority voters' candidate of choice usually will be defeated. According to the defendants, in order to evaluate whether there is such a pattern, i.e., whether the minority-preferred candidate is usually defeated, the court must know who the minority-preferred candidates were across the whole range of elections. Here, the defendants submit, because the plaintiffs analyzed only a small subset of the elections — the seven pre-1991 elections involving a choice between a black and a white candidate — the court had no indication whether the minority-preferred candidate was defeated in the other eleven pre-1991 elections. Further, the defendants argue, even within the subset of elections that the plaintiffs did analyze, the plaintiffs failed to establish that the black candidates were all in fact the candidates of choice among black Red Clay voters.

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[18] (...continued)
we do not need to address the court's evaluation of the remaining evidence on white bloc voting, such as its evaluation of the exogenous elections or its evaluation of the extreme case analysis of the Red Clay elections. We urge the court on remand, however, to take the same flexible, realistic approach in evaluating the plaintiffs' evidence on white bloc voting that it employed in evaluating the evidence of political cohesiveness. *See infra* Part V.D.

This issue has several layers. First, there is the question of which of the black candidates in the black versus white elections analyzed by the plaintiffs were in fact the minority-preferred candidates. Second, we must consider whether the plaintiffs were required to introduce evidence of who was the minority-preferred candidate in *all* elections, including those elections involving only white candidates. Ultimately, we must determine whether the plaintiffs' limited evidence would have been sufficient to support a finding of legally significant white bloc voting. We will address these issues in turn.[19/] First, however, it is important to give

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[19/] We do not reach the related, but potentially more difficult question of what evidentiary weight, if any, should be given the election of minority candidates who are not the minority voters' candidate of choice. This issue produced a sharp split between the majority and the dissent in a recent opinion by the Fifth Circuit. *See League of United Latin American Citizens, Council No. 4434 v. Clements*, No. 90-8014, 1993 U.S. App. LEXIS 1305 (5th Cir. Jan. 27, 1993) (addressing, among other issues, the effect of the election of black Republican judges to the vote dilution analysis), *reh'g en banc ordered on motion of the court*, 984 F.2d 634 (Feb. 11, 1993).

Two elections here could, at least potentially, pose this issue – the 1990 election of Scotton over another black candidate and the 1991 election of Greene over a white candidate. Although no evidence was introduced on the 1991 election, the court took judicial notice of the results. Similarly, there was little evidence on whether or not Scotton was the minority voters' representative of choice. *See Jenkins*, 780 F. Supp. at 224-25. Accordingly, we do not know whether the court will have to address this issue as to either election. Since the issue is not directly presented by the instant appeal and has not been briefed by the parties, we will not address it.

some background.

The defendants' specific argument is subsumed within a broader question — the significance of a candidate's race to the court's analysis of white bloc voting. The conflict arises in part because *Gingles* produced a split of opinions on this issue. While Justice Brennan garnered a majority for most of his opinion, that majority was lost in his discussion of the relevance of a candidate's race. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, took the position that "it is the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate, that is important." *Id.* at 68, 106 S. Ct. at 2775 (Brennan, J., plurality opinion) (emphasis in original); *see also id.* at 62, 106 S. Ct. at 2772 (Brennan, J., plurality opinion) ("For purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates ....").

Justice White, who joined Justice Brennan's opinion in all other aspects, wrote separately to state that, in his view, courts could not ignore the race of the candidate. To do so, warned Justice White, would lead to violations based simply on differing interests, not racial discrimination. *Id.* at 83, 106 at 2783 (White, J., concurring) ("This is interest-group politics rather than a rule hedging against racial discrimination.").

Justice O'Connor, in a separate opinion joined by Chief Justice Burger and Justices Powell and Rehnquist, joined Justice White in rejecting Justice Brennan's position that the race of the candidate could *never* be relevant. *Id.* at 100-01, 106 S. Ct. at 2792 (O'Connor, J., concurring in the judgment). Justice O'Connor, taking issue with such an absolutist view, concluded that "[t]he overall vote dilution

inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns." *Id.* at 101, 106 S. Ct. at 2792 (O'Connor, J., concurring in the judgment).

The courts of appeals, in the absence of explicit direction from the Supreme Court, have adopted a variety of approaches to determining which candidates are minority-preferred. The Seventh Circuit in *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3771 (U.S. May 17, 1993) (No. 92-1415), for instance, focused on the race of the candidate refusing to discount the election of a black Republican, even though the majority of black voters were Democrats who generally refused to support a Republican candidate. The Eleventh Circuit, in contrast, has held that "[u]nder Section 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate that is important." *Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1557 (11th Cir. 1987), *cert. denied*, 485 U.S. 936, 108 S. Ct. 1111 (1988). The Fifth Circuit has adopted yet another position:

> [W]e conclude that *Gingles* is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter — but only within the context of an election that offers voters the choice of supporting a viable minority candidate.... Justice Brennan's plurality opinion is careful not to state that a black candidate is tantamount to the black preference; but implicit in the *Gingles* holding is the notion that black preference is determined from elections which offer the choice of a black candidate. The various *Gingles* concurring and dissenting opinions do not consider evidence of elections in

> which only whites were candidates. Hence, neither do we.

*Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503-04 (5th Cir. 1987), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3213 (1989).

While we think these standards have much to recommend them, we believe that they are also inadequate standing along because each adopts too rigid a view as to which candidates may be considered minority preferred. In so doing, each adopts a standard which is over- or under-inclusive. For instance, we conclude that the Seventh Circuit, by calling any same-race candidate minority-preferred, has established an over-inclusive standard. There may well be minority candidates who cannot be considered the minority community's representative of choice, and § 2 specifically provides that the section is violated if "members [of a protected] minority have less opportunity than other members of the electorate to participate in the political process and to elect *representatives of their choice*," 42 U.S.C. § 1973(b) (emphasis added). Conversely, a rule permitting only minority candidates to be considered minority-preferred may well be under-inclusive; there may be majority candidates who truly may be the minority community's representative of choice.

Instead, we believe that the goals and underlying principles of the Voting Rights Act are best promoted by a more flexible approach, as appears to have been adopted by the Tenth Circuit in *Sanchez v. Bond*, 875 F.2d 1488, 1494-95, 1496 (10th Cir. 1989), *cert. denied*, 498 U.S. 937, 111 S. Ct. 340 (1990). There, the court rejected a per se rule that elections involving only white candidates could never be relevant. *Id.* at 1495. Instead, the court concluded:

> Such elections may be relevant and can be used to discern whether racially polarized voting exists and to measure the success of minority preferred candidates, so long as one of the Anglo candidates can be considered a preferred candidate of the minority group. As with other types of relevant evidence, the district court has a right to consider these elections and to give them such weight as the circumstances warrant.

*Id.* While the court in *Sanchez* provided some guidance for determining which candidates may be considered minority-preferred,[20/] we believe it is important to embellish slightly on its standard, as described below, to emphasize two points: (1) that not all minority candidates will be minority-preferred; and (2) that it is important to look beyond whether a white candidate received a majority of the minority community's vote and determine whether that white candidate is truly the minority community's representative of choice.

b. Were the Black Candidates the Candidates of Choice Among the Black Voters of Red Clay?

While it may be tempting to assume that a minority candidate is always the candidate of choice among minority voters, this is not always true. A minority candidate may

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[20/] The court in *Sanchez* affirmed the district court's finding that particular Anglo candidates were minority-preferred, in part, because there was substantial evidence that the Hispanics constituted a majority of the Democratic party, were very active in politics, and that no candidate could secure the Democratic nomination without the support of Hispanics. Thus, the court concluded, not only did the relevant Anglo "candidates receive substantial Hispanic support in terms of votes, but the evidence suggests that they were *chosen* by Hispanics in the first place." *Id.* at 1496.

have very different interests than the majority of minority voters. Or, the minority candidate may be viewed as outside the mainstream with no possible hope of success, and may therefore be unable to garner minority support. Accordingly, the plaintiffs must establish on an election-by-election basis, by a preponderance of the evidence, which black candidates are minority-preferred. *Cf. Gingles*, 478 U.S. at 46, 106 S. Ct. at 2764 ("[T]he results test does not assume the existence of racial bloc voting; plaintiffs must prove it.").

Nevertheless, experience does demonstrate that minority candidates will tend to be candidates of choice among the minority community. This practical experience leads to the inference that any particular minority candidate is minority preferred, and thereby takes plaintiffs a considerable distance towards meeting their production burden on this issue. This inference, however, is not enough on its own to meet this burden. Rather, plaintiffs must introduce some additional evidence showing that the particular minority candidate is minority-preferred. The additional evidence required to meet the threshold, however, is not very substantial, and the burden may be satisfied with a variety of evidence, including lay testimony or statistical analyses of voting patterns.

The defendants argue that the plaintiffs failed to establish that the black candidates on which they rely were the preferred candidates of Red Clay's black voters. While the district court failed to make explicit findings as to which candidates were or were not minority-preferred, it generally noted that it was "not convinced that all of these black candidates were the preferred candidates of the black community." *Jenkins*, 780 F. Supp. at 233.

The defendants' arguments on this point are insubstantial. Of the seven pre-trial elections in which there was a black and a white candidate, the defendants specifically challenge the status of only three of the black candidates as minority-preferred. In particular, they submit that the lay testimony establishes that in two of the elections, the 1983 Anderson-Cavanaugh race and the 1988 Mitchell-Manning-Nuttal race, a white candidate was the preferred candidate of black voters. The defendants also argue from a third election, the 1985 Eckman-Roberts race, where, according to the plaintiffs' own theoretical maximum white vote analysis, up to 53% of white voters theoretically could have voted for Roberts, the black candidate. While the argument is not well developed, the defendants seem to contend that Roberts was not shown to have been minority-preferred because, based on the theoretical maximum white vote analysis, he may have received a substantial portion of the white vote and yet still lost. Thus, the argument would follow, he could not have been supported by a majority of black voters as well, or he would have won.

As to the other four candidates, the defendants admitted in their Proposed Findings of Fact and Conclusions of Law that the three black candidates in the 1981 elections and Miller in the 1983 election were preferred by black voters. The defendants unambiguously conceded that "the uncontroverted lay testimony tends to show that [these candidates] for the Red Clay Board were preferred by black voters."[21/] The defendants have pointed to no evidence that

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21/ Similarly, in their appellate brief, the defendants state:

> Plaintiffs' lay evidence did tend to show some black cohesion for black candidates Roberts, Anderson and Connor in 1981, candidate Miller in 1983 (District A) and Roberts again in 1985.

would tend to contradict this lay testimony, and they are, at all events, bound by their admissions.

Returning to the three candidates that the defendants do challenge, their arguments as to two are without merit. With regard to the 1988 Mitchell-Manning-Nuttal race, the plaintiffs introduced a regression analysis which indicated that approximately 100% of the black Red Clay voters supported Mitchell in the 1988 election. While the defendants expressed a number of concerns about the methodology employed in that analysis, the district court extensively considered those arguments and ultimately rejected them, crediting the results of the analysis. *Jenkins,* 780 F. Supp. at 228-29, 230, 231. This finding was supported by the plaintiffs' evidence, and was not clearly erroneous. Since approximately 100% of the black voters of Red Clay supported Mitchell, he was clearly their candidate of choice.

The defendants point to the testimony of two plaintiffs that they supported one of the white candidates over Mitchell in 1988 to argue that the evidence demonstrated that Mitchell was not the minority's preferred candidate. The testimony of two individual plaintiffs, however, does not negate the analysis of the plaintiffs' expert, Dr. Lichtman. Sporadic lay testimony, while not irrelevant, is necessarily less indicative of black voters' voting patterns generally than the regression analysis. *See Gomez v. City of Watsonville,* 863 F.2d 1407, 1416 (9th Cir. 1988), *cert. denied,* 489 U.S. 1080, 109 S. Ct. 1534 (1989).

The defendants' argument with regard to the 1985 Eckman-Roberts race is similarly unavailing. The *theoretical* maximum white vote analysis does not, and cannot, address the issue of which candidates are minority-preferred. The analysis takes as its starting point the artificial assumption that no black voters supported the black candidate.

Thus, it reveals nothing about how many black voters actually supported a particular candidate. At a minimum, therefore, at least six out of the seven black candidates who ran against white candidates in Red Clay elections prior to 1991 were minority-preferred.

The defendants further assert that the district court's finding of political cohesiveness among the black citizens of Red Clay does not support an inference that the black candidates in Red Clay elections were minority-preferred. According to the defendants, because the cohesiveness finding was based primarily on statistical evidence from exogenous elections, it tells us nothing about which candidates the black voters supported in Red Clay elections. The defendants' argument, however, ignores both the practical realities of the voting behavior and the nature of the proof used to establish cohesiveness.

The plaintiffs' proof of cohesiveness was premised on Dr. Lichtman's analysis showing "that the black citizens of Red Clay consistently vote in greater than landslide proportions for the black candidate in elections between black and white candidates." *Jenkins*, 780 F. Supp. at 228. The district court credited this testimony, *id.* at 230, and concluded that the expert testimony in conjunction with the "mixed" lay testimony, while not overwhelming, was sufficient to establish that the black voters of Red Clay usually were politically cohesive, *id.* at 230-31. According to the district court's finding, there was a strong correlation between the race of the candidate and the preferences of black voters. This raises an inference that any particular black candidate was the minority voters' candidate of choice. And while that inference alone might not be sufficient to establish that a particular candidate was minority-preferred, it takes the plaintiffs a considerable distance toward establishing that proposition.

In light of the foregoing analysis, we conclude that, in at least six of the seven pre-1991 elections in which there was both a white and a black candidate, the plaintiffs' evidence would have required a finding that the black candidate was the candidate of choice among the black voters of Red Clay. With regard to the seventh candidate, Anderson, the evidence was mixed. Thus, it will be up to the district court on remand to determine whether Anderson was a minority-preferred candidate.

The question remains, however, whether in analyzing only these seven elections the plaintiffs provided a sufficient basis for a finding of legally significant white bloc voting. To answer that question, however, we need consider whether there is necessarily a minority-preferred candidate in every election and whether plaintiffs must identify all of the minority-preferred candidates.

c. Were any of the White Candidates in White Versus White Elections the Minority-Preferred Candidates?

The defendants also argue that the plaintiffs may not selectively choose which elections to analyze, but rather must analyze all the elections, including those involving only white candidates. It is only on the basis of such a comprehensive analysis, the defendants submit, that the court is able to evaluate whether or not there is a pattern of white bloc voting that usually defeats the minority voters' candidate of choice. We disagree.

As a general matter, we believe that elections involving white candidates only are much less probative of racially polarized voting than elections involving both black and white candidates. As was explained by the Fifth Circuit in *Westwego III*, 946 F.2d 1109 (5th Cir. 1991):

> "[T]he evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates." "[W]hen there are only white candidates to choose from it is 'virtually unavoidable that certain white candidates would be supported by a large percentage ... of black voters.'" Thus, it is not particularly surprising — and not particularly probative — that analysis of elections that included only white candidates did not reveal any racial polarization.

*Id.* at 1119 n.15 (citation omitted; quoting *Westwego I*, 872 F.2d 1201, 1208 n.7 (5th Cir. 1989)); *see also Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988) (rejecting defendants' argument that "any time a candidate gets a majority of the minority votes he is the 'chosen representative' of the minority group"), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3213 (1989).[22/]

We therefore do not believe that plaintiffs are required to present evidence on white versus white elections if they do not believe that those elections are probative. If the defendants want to introduce evidence on those elections in an attempt to rebut the plaintiffs' evidence of cohesiveness or white bloc voting, they may do so. Nevertheless, because

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[22/] While the Voting Rights Act encompasses a broader focus than simply the election of minority candidates, if the minority community would prefer a minority candidate or believes that a minority candidate would best represent its interests, then § 2 establishes a right on the part of those citizens for their preferred minority candidates to have an equal opportunity to be elected. As the court stated in *Smith v. Clinton*, the requirements of the Voting Rights Act are not met if "[c]andidates favored by blacks can win, but only if the candidates are white." 687 F. Supp. 1310, 1313 (E.D. Ark.) (three-judge court), *aff'd mem.*, 488 U.S. 988, 109 S. Ct. 548 (1988).

white versus white elections tend to be less probative, there may still be cases in which "[t]he evidence of polarized voting ... is so strong ... that it cannot be overcome even when all reasonable inferences are accorded to the evidence of elections involving only white candidates." *Smith v. Clinton,* 687 F. Supp. at 1317.

Because the district court may, in its discretion, decide to allow the defendants to introduce evidence on which, if any, white candidates were minority-preferred,[23] *see infra* Part VI, we will provide guidance on this inquiry. In deciding which, if any, of the white candidates were minority-preferred, the court must engage in a detailed, practical evaluation of the extent to which any particular white candidate was, as a realistic matter, the minority voters' representative of choice. We believe that there are a number of factors to which a court can look to determine whether a white candidate may properly be considered the minority's preferred candidate.[24] One relevant consideration is the extent to which the minority community can be said to have sponsored the candidate. *See* Evelyn E.

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[23] It does not appear that the defendants have argued that particular white candidates in white versus white elections were minority-preferred. They do, however, make such an argument in connection with their claim that the plaintiffs have attained proportional representation. *See* Appellee Brief at 26-27. Contrary to their assertion therein, however, there is no indication that the court considered the success of white candidates in evaluating any portion of the plaintiffs' claim. Moreover, a review of the defendants' argument demonstrates that their evidence amounted to little more than an attempt to show that particular white candidates may have received the majority of the black vote. As demonstrated *infra*, we do not think that this standing alone is sufficient to establish that a white candidate in an election offering only a choice between white candidates was minority-preferred.

[24] We of course do not intend this list to be exhaustive.

Shockley, Note, *Voting Rights Act Section 2: Racially Polarized Voting and the Minority Community's Representative of Choice,* 89 Mich. L. Rev. 1038, 1061 (1991). In determining whether the minority community sponsored the candidate, the court should look to the level of minority involvement in initially advancing the particular candidate and in conducting or financing that candidate's campaign. *See id.* at 1062.

Additionally, the attention which the candidate gave to the particular needs and interests of the minority community, including the extent to which the candidate campaigned in predominately minority areas or addressed predominately minority crowds and interests, may be relevant factors. *Cf.* S. Rep. at 29, *reprinted in,* 1982 U.S.C.C.A.N. at 207 (setting out as one of the additional Senate Factors to be considered in evaluating the totality of the circumstances "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group"); *Hall v. Holder,* 955 F.2d 1563, 1568 (11th Cir. 1992) ("[T]he totality of the circumstances surrounding a § 2 claim may properly be considered when determining whether plaintiffs have established the three *Gingles* preconditions."), *cert. granted on a different question,* 113 S. Ct. 1382 (1993).

Another relevant consideration would be the rates at which black voters turned out when a minority candidate sought office as compared to elections involving only white candidates. *See Campos,* 840 F.2d at 1245. Finally, bearing in mind the disincentives that may exist for minority candidates to seek office, the extent to which minority candidates have run for office and the ease or difficulty with which a minority candidate can qualify to run for office may be relevant considerations.

This inquiry, while complex, is nevertheless, flexible, and we believe that it best furthers the purposes of the Voting Rights Act. Courts, however, should be especially careful to explain fully their reasons for finding that a particular non-minority candidate was minority-preferred and their conclusions as to the impact of that election on the overall analysis. *Cf. Westwego I*, 872 F.2d 1201, 1203 (5th Cir. 1989).[25/]

d. Can the Court Determine a Pattern Based on the Limited Number of Elections Addressed by the Plaintiffs?

The defendants' ultimate argument is that the plaintiffs, in addressing only seven of the twenty contested Red Clay elections, introduced insufficient evidence as to which candidates were minority-preferred to permit a finding of legally significant white bloc voting. In order for white bloc voting to be legally significant, the defendants argue, the evidence must demonstrate a *pattern* of white bloc voting sufficient usually to defeat the minority-preferred candidate.

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[25/] In *Westwego I*, the Fifth Circuit said of Voting Rights cases generally:

> Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions, we have strictly adhered to the rule 52(a) requirements in voting dilution cases and have required district courts to explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning . . . . Perhaps in no other area of the law is as much specificity in reasoning and fact finding required . . . ."

*Id.* (quoting *Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984)).

The defendants submit that seven out of the twenty contested elections since 1981 is too small a sample to allow a court to determine whether a pattern of white bloc voting exists. We disagree.

First, seven elections over a period of ten years is not such a small sample that a court would be unable to discern the presence of a pattern of white bloc voting usually defeating the minority voters' candidate of choice. As the plaintiffs point out, the Supreme Court in *Gingles* upheld a finding of vote dilution based on the analysis of only three elections involving black candidates. *See Gingles,* 478 U.S. at 58-59, 80-82, 106 S. Ct. at 2770, 2782-83. Similarly, the Fifth Circuit has rejected a defendant's argument that analysis of only two elections within the relevant political unit cannot adequately reflect past and present reality. *Citizens for a Better Gretna v. City of Gretna,* 834 F.2d 496, 502-03 (5th Cir. 1987), *cert. denied,* 492 U.S. 905, 109 S. Ct. 3213 (1989).

Moreover, we believe that the defendants put undue emphasis on the need to prove the existence of a pattern. We conclude that the Supreme Court took a much more flexible approach to establishing white bloc voting than the defendants' argument indicates. While the Court held in *Gingles* that "a pattern of racial bloc voting that extends over a period of time is *more probative* of a claim that a district experiences legally significant polarization than are the results of a single election," 478 U.S. at 57, 106 S. Ct. at 2769 (emphasis added), the Court specifically went on to state:

> The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the

> minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

*Id.* at 57 n.25, 106 S. Ct. at 2769 n.25; *see also Westwego I*, 872 F.2d at 1208-10; *Citizens for a Better Gretna*, 834 F.2d at 502 ("*Gingles* ... suggests flexibility in the face of sparse data."). The Supreme Court's language clearly indicates that an inability to offer statistical evidence on a large number of elections should not necessarily foreclose a voting rights claim.

In the present case, the plaintiffs established that the black candidate in at least six of the seven pre-1991 Red Clay elections involving a choice between a black and a white candidate was minority-preferred. Further, they produced sufficient evidence on the seventh candidate to permit the district court's consideration of whether that candidate was minority preferred. The plaintiffs are not, however, required to introduce evidence on elections involving white candidates only, and the defendants did not show that any white candidates in elections offering only a choice among white candidates were minority-preferred in an attempt to counter the plaintiffs' proof. We conclude therefore that the district court had a sufficient basis from which to find the existence of legally significant white bloc voting; i.e., white bloc voting sufficient usually to defeat the

minority's representative of choice.[26] Accordingly, we cannot affirm the district court's judgment based on the defendants' alternative argument.

## C. SUSTAINED PROPORTIONAL REPRESENTATION

In *Gingles*, a majority of the Supreme Court held that persistent proportional representation by minority-preferred candidates was presumptively inconsistent with proving a § 2 violation. Justice Brennan, in a portion of his opinion joined only by Justice White, stated:

> This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.

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[26] There are two additional elections as to which the plaintiffs arguably had an obligation to introduce evidence concerning the minority community's preferred candidate, but failed to do so: Scotton's victory in 1990 and Greene's post-trial victory in 1991. As noted elsewhere, however, there are a number of outstanding questions as to the weight that could be given these elections even if the winning candidate were deemed to have been minority-preferred. *See supra* n.[9] and accompanying text (noting the plaintiffs' argument that because the court found some special circumstances in connection with Scotton's election it could not consider that election in evaluating white bloc voting) & typescript at [19-20] (noting the plaintiffs' argument that no weight may be accorded post-trial elections because the court has no evidence concerning the circumstances surrounding that election). At all events, we need not address whether the plaintiffs had an obligation to introduce evidence on these elections or the weight that should be accorded these victories. Even assuming that both Scotton and Greene were minority-preferred, there was still a sufficient basis for the district court to have found legally significant white bloc voting.

478 U.S. at 77, 106 S. Ct. at 2780 (opinion by Brennan, J.). This view was endorsed by Justice O'Connor in her concurring opinion, joined by Chief Justice Burger and Justices Powell and Rehnquist:

> I agree with Justice Brennan that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation.

*Id.* at 102, 106 S. Ct. at 2793 (O'Connor, J., concurring in the judgment).[27] The majority of the Court, however, also made clear that "[w]here multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters." *Id.* at 76, 106 S. Ct. at 2780.

The defendants argue that the election of 3 black candidates from 1981 through 1991 demonstrates that the black voters of Red Clay have achieved what is essentially proportional representation and that they therefore cannot prevail on a § 2 claim. Specifically, the defendants point out that black candidates won three out of the twenty contested elections between 1981 and 1991, or roughly 15%, a success

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[27] Both opinions also recognized the possibility that plaintiffs could rebut this presumption, but stated that *Gingles* gave the Court no opportunity to consider what, if any, circumstances would constitute such proof. *Id.* at 77, 106 S. Ct. at 2780 (opinion by Brennan, J.) ("In some situations, it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives, but appellees have not done so here."); *id.* at 102, 106 S. Ct. at 2793 (O'Connor, J., concurring in the judgment) ("Moreover, I agree that this case presents no occasion for determining what would constitute proof that such success did not accurately reflect the minority group's actual voting strength in a challenged district or districts.").

rate which, given that 12.97% of the total voting age population of the Red Clay School District is black, exceeds proportional representation.[28] The defendants' argument fails, however, in light of the district court's finding on this issue.

The district court thoroughly considered the extent to which black candidates have been successful. *Jenkins*, 780 F. Supp. at 224-26. It noted that three black candidates — Roberts in 1981, Scotton in 1990, and Greene in 1991 — had won seats on the Red Clay School Board. *Id.* at 224. The court further concluded, however, that the weight given to at least two of these results should be discounted (though not entirely disregarded) because of the special circumstances under which the candidates were able to prevail. *Id.* at 225. In particular, with regard to Roberts' victory in 1981, the court noted that Roberts ran against five white candidates. While the court refused to disregard the result entirely, because multiple candidate races were not that unusual, it found that the Court would weigh a black candidate's victory in a smaller field of candidates." *Id.*[29]

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[28] By addressing only the contested elections, the defendants exclude the two seats that were appointed and the three instances in which a candidate ran unopposed. Including these "uncontested" elections, however, would still give black candidates a success rate of 12%, just under their percentage in the electorate.

[29] With regard to Scotton's election in 1990, the district court specifically rejected the plaintiffs' arguments that the failure of a white candidate to run for the seat, the decision of a white candidate to run on a slate with Scotton, and Scotton's ultimate victory were all the result of the pending lawsuit; i.e., that the majority acquiesced in (and promoted) a minority victory because they knew it would support, and was possibly essential, to their position in litigation to have a second black candidate elected. *Id.* However, the court temporized, also finding that Scotton's

(continued...)

Ultimately, the court concluded that, while the black voters of Red Clay had achieved some success, because there had also "been some under-representation of black citizens on the Red Clay Board and because some of the black candidates' success may have occurred in unusual circumstances, the Court [would] proceed to consider the *Gingles* threshold factors." *Id.* at 226. We read this as a finding that the black voters of Red Clay had not achieved the persistent proportional representation discussed in *Gingles* that would defeat a § 2 claim at the threshold and thereby obviate the need to consider the *Gingles* factors. We conclude that the court's finding in this regard was not clearly erroneous as the record amply supports a finding that the black voters of Red Clay have not achieved persistent proportional representation.

Prior to the commencement of this lawsuit, only a single black had been elected to the Red Clay School Board. Although Scotton's victory in the 1990 election was not shown to have been caused by the pendency of the lawsuit,[30] *see Jenkins*, 780 F. Supp. at 225, the minority

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[29] (...continued)
election failed to "provide a measure of a black candidate's ability to be elected when running against a white candidate." *Id.* at 224-25.

Finally, it is not entirely clear what weight the district court gave Greene's post-trial victory in 1991. The court recognized that there was no evidence about the circumstances surrounding the election, but it nevertheless took judicial notice of the result as showing that "a black candidate did win an election when running against one white candidate ...." *Id.* at 225.

[30] The plaintiffs argue, in essence, that certain factors associated with Scotton's victory would not have occurred but for concern over the lawsuit. In particular, they argue that the fact that this is the only (continued...)

successes in 1990 and 1991 are sufficiently recent and, potentially, transitory to limit their probative value. Both Justices Brennan and O'Connor stated clearly that the minority's electoral success must be consistent and sustained. *See Gingles*, 478 U.S. at 77, 106 S. Ct. at 2780 (opinion by Brennan, J.); *id.* at 102, 106 S. Ct. at 2793 (O'Connor, J., concurring in the judgment). While the success of black candidates in recent elections may presage a change in voting patterns that will lead to consistent proportional representation, on the present record, there is simply no way to conclude that the results are evidence of such a change.

Additionally, the court found that both the election of Roberts in 1981 and Scotton in 1990 were accompanied by special circumstances and refused, based on those findings, to accord full weight to either election. *See Jenkins*, 780 F. Supp. at 225. Based on the record, we conclude that the district court's finding in this respect was not clearly erroneous.[31] Accordingly, we conclude that judgment here cannot be affirmed on the defendants' alternative argument that the black voters of Red Clay have achieved persistent proportional representation.

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[30] (...continued)
election in which a white candidate did not challenge a black candidate (here there were two black candidates) and the fact that Scotton was included on a slate with a white candidate were directly attributable to concern over the lawsuit.

[31] The plaintiffs argue on appeal that once the district court made a finding of special circumstances, as a matter of law it had to entirely disregard the results of those elections, rather than just diminish the weight that they would be accorded. Because we affirm the district court's finding that there was no persistent proportional representation, we need not address whether a court may discount, rather than entirely disregard, the results of elections accompanied by special circumstances.

## D. POLITICAL COHESIVENESS OF THE BLACK RED CLAY VOTERS

As the second *Gingles* factor, the Supreme Court held that in order to establish a violation of § 2, "the minority group must be able to show that it is politically cohesive." *Gingles*, 478 U.S. at 51, 106 S. Ct. at 2766.[32] After

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[32] The Supreme Court explained the rationale behind the requirement as follows: "If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Id.*

There is a relationship between political cohesiveness and the inquiry, relevant to the third *Gingles* factor, as to which candidates are minority-preferred. Unless the minority community is politically cohesive, with the similarity of interests and goals that that embodies, it will be impossible to identify a candidate who can be said to be that community's representative of choice. For these same reasons, plaintiffs' proof on political cohesiveness and which candidates are minority-preferred is often similar; both factors are commonly shown through evidence that the minority community tends to support particular candidates. The correspondence also makes sense within the general framework of *Gingles*, which is directed towards determining whether racially polarized voting in conjunction with a particular electoral structure thwarts the minority community's ability to have its interests fairly represented in the political process:

> The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. . . . The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.

*Gingles*, 478 U.S. at 47-48, 106 S. Ct. at 2764-65 (citation omitted).

reviewing the parties' evidence on the political cohesiveness of the black Red Clay voters, the district court concluded:

> [T]he evidence of minority cohesion in *Red Clay* has not been established by clear and convincing evidence but it was sufficient to establish by a preponderance of the evidence that black voters of Red Clay usually are politically cohesive. The Court, therefore, concludes that the Plaintiffs have established the second factor of the *Gingles* analysis.

*Jenkins*, 780 F. Supp. at 231 (emphasis in original).

While the plaintiffs clearly welcome the district court's ultimate finding of political cohesiveness, the defendants' position on this finding is less clear. Although the defendants never directly challenge the district court's finding of cohesiveness, they forcefully attack the sufficiency of all the evidence, especially the statistical evidence, upon which that finding is based. Since the defendants have challenged the foundations of the court's finding, we believe that they have effectively challenged the finding itself. Therefore, we will review the district court's finding of political cohesiveness.

First, the district court thoroughly considered the plaintiffs' expert analysis and the defendants' attacks on the reliability of that analysis. *See Jenkins*, 780 F. Supp. at 227-30. Our review satisfies us that the district court's consideration of the statistical evidence was supported by a reasonable analysis of the expert witnesses' conflicting opinions, *id.* at 230, and by reference to the existing literature in the field, *id.* at 229; *see also* Trial Transcript, Vol. F, at 48-52 (Apr. 23, 1991).

Additionally, we conclude that the district court took a properly flexible approach to the evidence and recognized that, in addition to examining the validity of particular pieces of evidence, it must consider the evidence as a whole. Because voters in Red Clay may vote at any polling place within the district, the plaintiffs were only able to acquire the underlying data necessary for their expert to do a statistical analysis of the voting patterns on a single Red Clay election — the 1988 election among Manning, Nuttal, and Mitchell. *See supra* nn.[11] & [12]; *Jenkins*, 780 F. Supp. at 227. While the court found the plaintiffs' regression analysis of the 1988 election probative, it also recognized that that evidence alone could not carry the plaintiffs' burden of proof. *Jenkins*, 780 F. Supp. at 230. The court, however, correctly found that the lack of additional evidence specific to Red Clay elections did not necessarily prevent the plaintiffs from proving their case. *See id.* (noting that the regression analysis pertained only to a single Red Clay election, but going on to consider other evidence and concluding that that evidence supported the results of the regression analysis of the 1988 Red Clay election).

The Supreme Court's discussion in *Gingles* on the closely related issue of proving white bloc voting is instructive.[33] The Court noted that "a pattern of racial bloc voting that extends over a period of time is *more probative* of a claim that a district experiences legally significant polarization than are the results of a single election." *Gingles*, 478 U.S. at 57, 106 S. Ct. at 2769 (emphasis added). The Court, however, explicitly qualified this statement, explaining:

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[33] *See supra* n.[32] (discussing the close relationship between political cohesiveness and the inquiry into which candidates are minority preferred in proving white bloc voting).

> The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. . . . Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.

*Id.* at 57 n.25, 106 S. Ct. at 2769 n.25. Thus the Court concluded that, even where there is no evidence of actual voting patterns from relevant elections within the district, by adopting a flexible approach to the evidence, plaintiffs may still be able to prove the existence of a violation.

The specific reason for the paucity of data in the present case is slightly different. The underlying concern, however, remains the same, namely, that minority voters should not be forced to suffer a violation of their rights under the Act because of external circumstances that limit the availability of data specific to the challenged district if other evidence supports their claim. We therefore follow *Gingles*' mandate that courts adopt a flexible approach in the face of these types of evidentiary problems. *See id.; Citizens for a Better Gretna*, 834 F.2d at 502 ("*Gingles* . . . suggests flexibility in the face of sparse data."); *cf. Hall v. Holder*, 955 F.2d 1563, 1568 & n.8 (11th Cir. 1992) (holding that plaintiffs may rely on the totality of the circumstances to establish the *Gingles* factors because otherwise, "[e]ven where the totality of the circumstances established that a challenged system violated § 2, plaintiffs would be unable to prevail if the method of polling or the electorate's size and composition were such that the gathering of mathematically 'certain' statistical data would be

impossible."), *cert. granted on a different question*, 113 S. Ct. 1382 (1993).

In the present case, the district court appropriately considered whether the plaintiffs' evidence reinforced or contradicted the direct statistical evidence of cohesiveness in the 1988 Red Clay election. Specifically, the court found that the statistical analyses of exogenous elections also tended to show political cohesiveness, even while recognizing that, by definition, exogenous elections could not perfectly mirror the population, issues, or election procedures found in Red Clay elections. *See Jenkins*, 780 F. Supp. at 229, 230; *see also Citizens for a Better Gretna*, 834 F.2d at 502 ("Although exogenous elections alone could not prove racially polarized voting in Gretna aldermanic elections, the district court properly considered them as additional evidence of bloc voting — particularly in light of the sparsity of available data."). Similarly, while the district court recognized the short-comings of the plaintiffs' "homogenous" precinct analysis,[34] *Jenkins*, 780 F. Supp. at 230, rather than rejecting the analysis entirely, the court concluded that even those less convincing results supported the results of the regression analysis. *Id.*

Finally, while the lay testimony was mixed, the court found that "in conjunction with the expert testimony it at least tends to support a finding that the black voters of Red Clay are politically cohesive." *Id.* Thus, the court concluded that the evidence as a whole, while far from overwhelming, "was sufficient to establish by a preponderance of the

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[34] The analyzed elections did not involve any precincts that were 90% black, *Jenkins*, 780 F. Supp. at 230, which is the normal standard used for homogenous precinct analysis, *see* Engstrom & McDonald, *supra*, at 371. Rather, each of the analyzed precincts had populations that were over 70% black. *Id.* at 230.

evidence that black voters of Red Clay usually are politically cohesive." *Id.* at 231. Although the defendants have made a number of cogent arguments against specific pieces of the plaintiffs' expert evidence on political cohesiveness, their arguments are not sufficient to warrant reversing the district court's finding as clearly erroneous.

## E. TOTALITY OF THE CIRCUMSTANCES

Finally, the defendants argue that even if we conclude that the district court's finding as to white bloc voting was erroneous, we should affirm based on the court's alternate finding on the totality of the circumstances:

> Even if the Court had concluded that the Plaintiffs had satisfied the three *Gingles* factors, the Plaintiffs have not established a violation when the totality of the circumstances are considered.

*Jenkins*, 780 F. Supp. at 241. Notwithstanding the district court's assertion that it would have found for the defendants even if the plaintiffs had established the three *Gingles* factors, we cannot affirm on this basis for three reasons.

First, the district court's good intentions notwithstanding, merely declaring that it would assume that the plaintiffs proved the existence of all three *Gingles* factors did not eliminate the fact that it was evaluating the totality of the circumstances in light of the flawed plurality-win theory, i.e., under the misapprehension that, even if white voters usually voted as a bloc to submerge minority preferences in an at-large election scheme, the voting scheme as a whole was not problematic because it allowed for the possibility (though rarely realized) for minority voters to elect a representative of choice with a plurality of the vote.

Second, the Voting Rights Act's requirement that courts consider the totality of circumstances based "upon a searching practical evaluation of the past and present reality and on a functional view of the political process," *see Gingles*, 478 U.S. at 45, 106 S. Ct. at 2764 (internal citation and quotation omitted), seems incompatible with the conclusory ("even if") analysis engaged in by the district court; *see also Westwego I*, 872 F.2d at 1203-04 ("'Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions, we have strictly adhered to the rule 52(a) requirements in voting dilution cases and have required district courts to explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning.'" (quoting *Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984)).[35/]

Third, in a related vein, even if we thought it was permissible for a court to engage in this type of analysis, we would be obliged to remand for a fuller explanation. As discussed, *supra* n.[6], it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances. In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting

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[35/] We endorse the Fifth Circuit's position on this point. Because of the complexity of the proof and the importance of the issues involved, the district courts must be particularly thorough in explaining their findings on both the ultimate issue of vote dilution and on their subsidiary findings as well.

Rights Act. *Cf. supra* n.[25] and accompanying text. While we do not rule out that possibility on remand, such a full explanation was not heretofore provided by the district court.[*]

## VI. CONCLUSION

We conclude that the district court committed reversible error in relying on the potential for the black voters of Red Clay to elect their candidates of choice even in the face of persistent white bloc voting when the record demonstrated that this potential was rarely realized. The third *Gingles* factor, as well as the Voting Rights Act generally, is concerned with the practical effects of a particular voting scheme on the rights of minority voters. Accordingly, whether the scheme might theoretically allow a victory for a minority-preferred candidate if factors were to coalesce properly is not the correct question. The correct question is whether the scheme as a whole has the actual effect of providing minority voters the same "opportunity [as] other members of the electorate to participate in the political process and to elect representative of their choice." 42 U.S.C. § 1973(b).

The record in this case did not establish that the ability to elect a candidate with a plurality of the votes in fact had the effect of allowing the black voters of Red Clay to elect their candidates of choice in the face of white bloc voting. To the contrary, the record demonstrated that no candidate, black or white, had been elected with a plurality since 1981.

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[*] Because we remand based on the district court's error in evaluating the existence of white bloc voting, we need not address the particulars of the court's analysis of the Senate Factors.

We also conclude that the defendants' alternative arguments for affirming the judgment are unpersuasive. Contrary to the defendants' arguments, there was a sufficient basis to have allowed the district court to find that there was legally significant white bloc voting. We also reject the defendants' arguments that the plaintiffs have clearly attained persistent proportional representation, that the plaintiffs' failed to prove political cohesiveness, and that the district court could be affirmed on the basis of its consideration of the totality of the circumstances.

Voting Rights challenges, by their nature, are often complex and difficult. The problem is greatly exacerbated in the present case because of the paucity of data available from which to analyze actual voting behavior in Red Clay elections. Given the importance of the issues at stake and the likelihood that the proper resolution of this case could be aided substantially by the introduction of additional evidence, we believe that the district court should consider the receipt of such evidence on remand.

At a minimum, we suggest that the district court on remand receive evidence on the 1991 election. We leave it to the district court to determine what if any weight to give the results of this election. In doing so, the district court may reevaluate the entire record in light of the additional evidence and may want to give particular consideration to the existence of special circumstances, in this or any prior elections, as it sees fit. While we recognize that such a procedure is not common, it is also not unique to this case, *see Westwego Citizens for Better Gov't v. City of Westwego*, 906 F.2d 1042, 1043-45 (5th Cir. 1990) (*Westwego II*) (remanding for the district court to accept evidence of a post-trial election); *see also Pittsburgh Press Club v. United States*, 579 F.2d 751, 755 (3d Cir. 1978) ("Whether a trial court will reopen the proceedings on remand is, of course,

a matter for its sound discretion."). More importantly, we believe that it is appropriate in light of the evidentiary problems presented here and the guidance we have provided in this opinion.

The judgment of the district court will be reversed and the case remanded for further proceedings consistent with this opinion. The parties will bear their own costs.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

| | | |
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| ALDEN JENKINS, et al, | ) | |
| | ) | |
| Plaintiffs, | ) | Civil Action |
| | ) | No. 89-230 LON |
| vs. | ) | |
| | ) | |
| RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION, et al, | ) | |
| | ) | |
| Defendants. | ) | |

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O P I N I O N

December 27, 1991
Wilmington, Delaware

LONGOBARDI, Chief Judge

This is a class action suit arising under section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973. The named representative Plaintiffs brought the action on behalf of all of the eligible black voters in the Red Clay School District ("District"). They allege that the current method of electing members of the Red Clay Board of Education ("Board") unlawfully dilutes the voting strength of black citizens and has the effect of providing black citizens in the Red Clay School District less opportunity than white citizens to participate in the political process and to elect candidates of their choice to the Red Clay Board of Education.

After denying a motion for preliminary injunction, the Court scheduled the matter for trial. The Court has jurisdiction pursuant to 28 U.S.C. §§1331, 1343(a)(3) and (4) and 42 U.S.C. §1973j(f). The Court also has jurisdiction to grant declaratory relief under 28 U.S.C. §§2201 and 2202.

## BACKGROUND

The District was established in November of 1980 by the Delaware State Board of Education. The regulations implementing 62 Del. Law, Ch. 351 describe the method of electing Board members in the District. Docket Item ("D.I.") 84, ¶5. Under the 1980 Census, the total population of the District was 123,240 of which 17,180 (13.95%) were black. The 1980 Census also shows that the District had a voting age population of 90,977. Black voting age

citizens numbered 10,781 (11.1%) *Id.*, ¶22. According to the 1990 Census, the total population of the District is 132,674. The black population is 19,252 (14.51%). The 1990 Census also shows that the District has a voting age population of 102,196 of which 13,257 (12.97%) are black. *Id.*, ¶23.

The Plaintiffs do not allege that the method of electing the Board members was established with any discriminatory or unlawful purpose or intent. *Id.*, ¶6. Indeed, the State Board reorganization plan, including the method of electing school board members, was reviewed and approved by Judge Schwartz in *Evans v. Buchanan*, 512 F.Supp. 839, 857 (D.Del. 1981) ("Five of the twenty-three persons elected to interim boards are black and each received more votes than some of the whites elected to the boards.").

There are seven seats on the Board. Members are elected to five year terms and the elections are staggered so that one or two seats are up for election each year. With the exception of the initial election which was conducted in January of 1981, the elections are held annually in May. Candidates must reside in and serve from one of seven nominating districts and elections are non-partisan. The only requirement to become a candidate for the Board is a petition of twenty eligible district voters. There is no voter registration requirement and all district residents over eighteen years of age are eligible to vote. The elections are conducted at-large and voters may vote for only one candidate from each nominating district at any polling place in the district. The candidate receiving a plurality of votes is elected. D.I. 84, ¶7. This system has been described as an at-large or multi-member district as opposed to a single-member district scheme.

In 1981, there were elections for six of the seven nominating districts. The board member for the seventh seat, district G, was appointed. In district A, one black candidate and six white candidates ran for the seat; a white candidate won the seat. In district B, one black candidate and five white candidates ran for the seat; the black candidate won the seat. The six candidates running for the district C seat were white. The four candidates running for the district D seat were white. In district E, one black candidate and four white candidates ran for the seat; a white candidate won the seat. The nine candidates running for the district F seat were white.

In 1982, two white candidates ran for the seat in district C. The incumbent white candidate ran unopposed for the seat in district G.

In 1983, a black and a white candidate ran for the seat in district A. In district D, the incumbent white candidate ran against a black candidate. The white candidates won in both elections.

In 1984, three white candidates ran for the seat in district C. Two white candidates ran for the seat in district E.

In 1985, the incumbent black candidate ran against a white candidate for the seat in district B. The white candidate won the seat. In district G, the incumbent white candidate ran unopposed.

In 1986, a white candidate was appointed to fill the seat in district C. In district F, three white candidates ran for the seat.

In 1987, four white candidates ran for the seat in district C.

In 1988, one black candidate and two white candidates ran for the seat in district A. A white candidate won the seat. In district D, the white incumbent candidate ran unopposed.

In 1989, two white candidates ran for the seat in district E.

In 1990, two black candidates ran for the seat in district B. Two white candidates ran for the seat in district G.

In 1991, a black and a white candidate ran for the seat in district C. The black candidate won the seat. In district F, two white candidates ran for the seat. *Id.*, ¶11; D.I. 106.

## THE LEGAL STANDARDS

Section 2 of the Voting Rights Act, as amended provides in pertinent part:

> (a) No voting . . . procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in

> the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42. U.S.C. §1973 (1988).

The Senate report accompanying the 1982 amendment identified factors which might indicate a section 2 violation:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting

practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of Plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized need of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting

> qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S.Rep.No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 206-07.

In 1986, the United States Supreme Court examined a multi-member districting plan under the amended section 2. *Thornburg v. Gingles*, 478 U.S. 30 (1986). After carefully considering the legislative history of the amendment, the Court decided that without proof of the existence of racial bloc voting, the existence of an at-large election system in conjunction with a lack of proportional representation does not establish a violation. *Gingles*, 478 U.S. at 46.

The Court stated that while many of the Senate factors may be relevant to a claim of vote dilution, three factors are essential to a claim that an at large election system illegally impedes minority voters' ability to elect representatives of their choice. The minority group must prove that it is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. In addition, the minority group must prove that it is politically cohesive. *Id.* at 51. Finally, the minority group must prove that the white majority votes as a bloc in a manner which usually allows the white majority, in the absence of special circumstances, to defeat the minority group's favored candidate. *Id.* The Court also stated that persistent proportional representation of minorities is inconsistent with a claim of vote dilution. *Id.* at 77.

With this analytical framework in mind, the Court will consider whether the class has carried its burden of proving that the at-large election system frustrates the black citizens of Red Clay from equally participating in the

political process and electing candidates of their choice to the Red Clay School Board.

## ANALYSIS

### I. *Extent of Black Electoral Success (Senate Factor No. 7)*

In many of the reported cases reviewed by this Court, it was clear as a matter of law that the minority group bringing the action was under-represented. *See, e.g., Solomon v. Liberty County*, 865 F.2d 1566, 1574 (11th Cir. 1988), *cert. denied*, 111 S.Ct. 670 (1991). Although not frequently addressed because of the circumstances of the particular cases reviewed, this factor is critical to a claim of voting rights dilution. *Gingles*, 478 U.S. at 48 n. 15. ("[T]he most important Senate Report factors bearing on §2 challenges to multimember districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'"). In this case, the parties vigorously dispute how the election results in Red Clay should be interpreted.

Three black candidates have been elected to the Red Clay School Board. A black candidate ran against five white candidates and won a seat in 1981. D.I. 84, Stipulated Fact Number 11. In 1990, a black candidate won a seat on the board in a race involving two black candidates. *Id.* In 1991, another black candidate won a seat on the board in a race against one white candidate. D.I. 106.

The Plaintiffs argue that every election won by a black candidate in Red Clay was won under special circumstances and, therefore, cannot be used as a measure of black candidates' success in achieving seats on the Board. They

contend that the 1981 election was atypical because it was the only year in which five or six candidates ran for each seat. This, in the Plaintiffs' opinion, fractured or diluted the white vote and allowed the black candidate to be elected.

The Plaintiffs argue that the 1990 election results should not be considered indicative of black voters' ability to elect candidates of their choice because the election occurred after the initiation of this lawsuit. It was the only time that two black candidates ran for the same seat without white opposition. The Plaintiffs admit, however, that it has not been established that the winning black candidate was or was not the preferred candidate of the black voters.

The Plaintiffs also contend that the 1991 results are of little value because the election occurred after the completion of trial and the Court heard no testimony on the specifics of the election. They have agreed, however, that the Court should take judicial notice of the result.

On the other hand, the Defendants argue that the Court should consider all of the elections which have been won by black candidates. The 1981 election predates this litigation. The Defendants contend that inclusion of the 1990 election result is appropriate because the Plaintiffs have not established that there was any connection between the pendency of this litigation and the results of the 1990 election. Finally, they contend that the result of the 1991 election is important even without analysis because it establishes that a black candidate running against one white candidate can win an election under the current system in Red Clay.

The Court finds that the Black candidate who won a seat in 1981 ran against five white candidates and it was unusual only because six seats were up for election at the

same time. This apparently increased voter turnout. Increased turnout, however, affects both black and white voters. Although 1981 was the only year in which six or more candidates ran for a seat, there have been several elections involving more than two candidates in Red Clay. In 1984, 1986 and 1988 there were elections involving three candidates. In 1987, four candidates ran for the seat in district C. The Court finds that because elections involving multiple candidates have occurred in the District, the 1981 election should not be disregarded completely. The Court will not, however, weigh it as heavily as the Court would weigh a black candidate's victory in a smaller field of candidates.

In the 1990 election, the wining black candidate was initially approached by an Hispanic school teacher with the idea that she should run for the School Board. Transcript ("Tr."), Volume ("Vol.") G at 65. The winning black candidate ran on a slate with a white candidate who had similar ideologies, including the same position on the feeder pattern issue.[1/] *Id.* at 32-33, 65-67. The white candidate and black candidate were opposed to a single district election system, *Id.* at 31, 70, and running together allowed the candidates to cover the District more economically. *Id.* at 33.

Based on this record, the Court finds it fails to establish that the pendency of the litigation caused two black candidates to run unopposed by a white candidate nor was it a reason that the winning black and the winning white candidate decided to run on the same slate. Therefore, the Court will consider this election in evaluating black electoral

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[1/] The feeder pattern issue relates to the busing of children from one area to a particular school.

success. The Court finds, however, that the election does not provide a measure of a black candidate's ability to be elected when running against a white candidate.

With regard to the 1991 election, the Court finds that it is evident that a black candidate did win an election when running against one white candidate under the current election system in Red Clay.

The success of black candidates can also be examined in terms of the number of blacks who were serving on the board each year. From the 1981 through the 1985 elections, one of the seven board members was black. This is approximately 14 percent of the board members. From the 1985 elections through the 1990 elections, none of the Board members were black. From the 1990 election through the 1991 election, one board member was black, again representing approximately 14 percent of the Board. Currently two of seven board members, or approximately 28 percent of the board members are black.

In considering whether this is a positive or negative record, the Court begins by noting that approximately 13 percent of the voting age population in the District is black. Assuming proportional representation were appropriate, one would expect that on the average one of every seven board members would be black and that black candidates would win approximately 13 percent of the elections.

The fact is that black citizens have achieved some electoral success in the District. In 1981 through 1985 and in 1990 through the present, black candidates have sat on the board in percentages greater or equal to the proportion of black citizens in Red Clay. When one considers all of the election years, blacks have won 15 percent of the contested seats, 25 percent of the elections involving black and white

candidates and 33 percent of the elections involving black candidates. Prior to the initiation of this suit, blacks had won 6.6 percent of the contested elections and 14 percent of the elections involving black and white candidates.

Thus, the Plaintiffs' claim of voting dilution rests on the fact that prior to the institution of this lawsuit, black candidates had won only 6.6 percent of the contested elections. If a black candidate had won one additional seat between the years 1985 and 1990, the Court would find that the black citizens had achieved proportional representation. The Court finds that prior to the initiation of the lawsuit, there was some under-representation of black citizens on the Red Clay Board. The Court also finds, however, that this lack of representation from 1985 through 1990 could very well be attributable to the failure of black citizens to consistently offer themselves as candidates during that period rather than to any defects in the at-large election system.[2/] Specifically, in 1986, 1987 and 1989, no black candidates ran for seat on the Red Clay Board and, as indicated supra, there are virtually no procedural restrictions in the system which would chill or frustrate black candidacy.

The Court finds, therefore, that on the whole this Senate Factor does not weigh heavily in favor of the Plain-

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[2/] The Court understands that a sustained inability to elect black preferred candidates could create an atmosphere which discourages blacks from participating in an election system which is perceived as biased. The record in this case, however, does not support such a finding. A black candidate was successful in the first election in Red Clay and sat on the Board until May of 1985. The Court considers the minimal structures on nominations of candidates for Board seats to be different from the nominating process for State, County and City positions and an important factor in evaluating the underrepresentation of blacks during some of the years in question.

tiffs. *Compare Westwego Citizens for Better Government v. Westwego*, 872 F.2d 1201, 1209 (5th Cir. 1989) (no black candidate ever ran in alderman elections); Solomon at 1574 (black candidate has never been elected to county-wide office); *Bradford County NAACP v. City of Starke*, 712 F.Supp. 1523, 1528 (M.D.Fla. 1989) (no black person has ever been elected to the Starke city commission nor to any other elected city office); *Smith v. Clinton*, 687 F.Supp. 1310, 1312 (E.D.Ark.) (despite a 37 percent black voting age population no black person ever elected to district 48-49 State Representative Seat), *aff'd*, 488 U.S. 988 (1988).

Because there has been some under-representation of black citizens on the Red Clay Board and because some of the black candidates' success may have occurred in unusual circumstances, the Court will proceed to consider the *Gingles* threshold factors.

II. *The Gingles Threshold Factors*

A. Size and Geographical Compactness of the Black Community

The Plaintiffs introduced undisputed evidence that the black population of Red Clay is sufficiently large and compact to form a majority of the voting age population in a single district if the District were divided into seven single districts. Specifically, a district could be created in which black citizens would constitute 62.7 percent of the total population and 59.75 percent of the voting age population. Tr., Vol. A at 37; Plaintiffs' Exhibit ("PX") 14. The Court

finds that the Plaintiffs have proven the first *Gingles* factor by a preponderance of the evidence.[y]

B. Political Cohesiveness of the Black Community

The Plaintiffs introduced expert testimony and lay testimony on the issue of the political cohesiveness of the black community in Red Clay.

*1. Expert Testimony*

Plaintiffs' expert on racial polarization, Dr. Lichtman, testified that there is no accepted definition of political cohesiveness. He testified, however, that in United States political history, voter support of 60 percent or more is considered a landslide level of support for a candidate. He suggested that when groups voted in excess of landslide proportions for a candidate, one could conclude that the group was politically cohesive. Tr., Vol B at 21-22.

Dr. Lichtman examined several Red Clay School Board elections in which black candidates ran against white candidates. He also studied many "exogenous elections", city and county elections in which a portion of the electorate was comprised of residents of the District. The techniques he used to analyze the elections can be divided into two main groups: inferential techniques and descriptive techniques. PX 7 at 3.

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[y] Although the Defendants agree that the Plaintiffs' evidence satisfies the first *Gingles* factor, they question whether such a district would allow the black citizens to consistently elect one candidate of their choice. Tr., Vol. D at 220-25; DX 42 at Tab H. This concern, however, does not negate a finding that the Plaintiffs have proven the first *Gingles* factor.

*(a) Inferential Techniques*

The inferential technique involves an ecological gression procedure which estimates the behavior of ›pulation groups based upon an equation which is computed ›r all the political units included within the analysis. PX 7 Appendix A. The regression equation used by Dr. ichtman studied the association between two variables: (1) ıe vote received by the black candidate, and (2) the racial omposition of the political unit. The correlation coefficient, xpressed as $R^2$, indicates the degree of association between hese variables. Social scientists generally consider $R^2$ ›alues in excess of .5 to be indicative of a strong associaion. PX 7 at 11.

When strong racial polarization occurs, Dr. Lichtman said ecological regression analysis will often produce impossible results. *Id.* at 64. For example an ecological regression may estimate that 110 percent of the black voters cast their vote for the black candidate. When his ecological regression estimates produced impossible results, Dr. Lichtman used the "method of bounds" to set the black vote for the black candidate at 100 percent and recalculated the regression estimates. *Id.* at 65.

Unfortunately, Dr. Lichtman performed a single ecological regression analysis on only one District election. Because Red Clay voters are not required to vote at any particular polling place, he testified it is necessary to have the sign-in or registration sheets in order to match voters with their election districts. *Id.* at 36-37. Once the voters are assigned to their appropriate election district, the race of the voter can be estimated by referring to census information indicating the racial composition of the district. The sign-in sheets for the elections, however, are destroyed after two or three years. Consequently, sign-in sheets were available for

only one contest between a back and a white candidate. This was the 1988 election.[4] *Id.* at 77.

Dr. Lichtman testified that his regression analysis estimates showed that in the 1988 Red Clay election virtually 100 percent of the black voters voted for the black candidate and less than 1 percent of the white voters voted for the black candidate. The $R^2$ for this regression estimate was .91. *Id.* at 44. The confidence intervals he reported were $\pm$ 20 percent for the estimate of the black voters and $\pm$ 3% for the estimate of the white voters. PX 52.[5] He testified that these results are indicative of strong racial polarization among the voters of Red Clay. *Id.* at 45.

Dr. Lichtman also analyzed several city and county elections involving contests between black and white candidates using ecological regression. The results of the single seat elections are summarized in the following table:

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[4] Sign-in sheets were available for the 1988, 1989 and 1990 elections but only the 1988 election was one between a back and a white candidate.

[5] The confidence intervals were reported at the 95 percent level, which means that a researcher assumes that there is a 95 percent probability that the actual percentage of black voters voting for the black candidate was between 80 and 120 percent (100 $\pm$ 20) and the actual percentage of white voters voting for the black candidate was between negative 3 and positive 3 percent (0 $\pm$ 3).

| Election | % B vote for BC[6/] | % W vote for BC[7/] | $R^2$ |
|---|---|---|---|
| 1990 Dem. Prim. New Castle County Dist. 4 | 100% | 38% | .74 |
| 1988 Dem. Prim. Mayor | 85% | 6% | .88 |
| 1988 Dem. Prim. Council Dist. 2 | 95% | 23% | .89 |
| 1988 Dem. Prim. Council Dist. 7 | 100% | 20% | .97 |
| 1986 Dem. Prim. New Castle County Dist. 4 | 100% | 11% | .83 |
| 1984 Dem. Prim. Mayor | 76% | 3% | .91 |
| 1984 Dem. Prim. Council Pres. | 94% | 13% | .93 |
| 1984 Dem. Prim. Council Dist. 2 | 66% | 34% | .78 |
| 1984 General Council Pres. | 100% | 53% | .76 |
| 1982 Dem. Prim. New Castle County Dist. 4 | 75% | 3% | .95[8/]. |

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[6/] This heading indicates the percent black vote for the black candidate.

[7/] This heading reflects the percent white vote for the black candidate.

[8/] All of this information is taken from PX 7 at 27-29.

Dr. Lichtman also studied several exogenous multiple seat elections. PX 10 at 2. Based upon the single Red Clay election and all of his exogenous election work, Dr. Lichtman concluded that the black citizens of Red Clay consistently vote in greater than landslide proportions for the black candidate in elections between black and white candidates. *Id.* at 124-25.

Dr. Lichtman's ecological regression work was criticized by the Defendants' expert, Dr. Dunivant. Dr. Dunivant contended that ecological regression provides reliable estimates of an individual voter's behavior only when certain criteria are met. According to Dr. Dunivant, estimates from ecological regression cannot be accepted unless the assumption of constant proportions or correct model specification is met. Tr., Vol. D at 95-96. Dr Dunivant stated estimates must also exhibit appropriate precision and reliability before they are considered reliable. *Id.* at 152. The researcher must also verify that the confidence intervals of the regression are not biased. Defendants' Exhibit ("DX") 42 at 17. Finally, the confidence intervals must exhibit normality of distribution in order to be reliable. DX 42 at 18. Dr. Dunivant testified that most of Dr. Lichtman's analyses failed one or more tests. Dr. Dunivant's critique of Dr. Lichtman's ecological regression work is summarized at Tab B of DX 42.

Dr. Dunivant raised an additional criticism with regard to using the exogenous elections to predict the voting behavior of the citizens in the Red Clay elections. In most of the exogenous elections, only 7 to 25 percent of the Red Clay electorate were eligible to vote and only 19 to 59 percent the black voters of Red Clay were eligible to vote. Generally, only 4 to 21 percent of the white electorate of Red Clay was eligible to vote in the exogenous elections. DX 42 at G. Furthermore, the racial composition of the

districts in the exogenous elections differs from the racial compositions of most of the districts in the Red Clay School District. The election systems are different and the issues in the elections are not the same. Dr. Dunivant stated that patterns appearing in the exogenous elections were not necessarily indicative of voting patterns of Red Clay voters. DX 42 at 19-21.

Dr. Dunivant also testified about regression analyses he performed on the 1988, 1989 and 1990 Red Clay elections to determine if there was a correlation between a candidate's position on mandatory reassignment of the A.I. duPont students and the voter's high school attendance zone residence. He testified that the data indicated there was a correlation between the neighborhood of a voter and voter's choice of candidates with a particular view on the feeder pattern issue. He would not however, rely upon these regressions because several assumptions were violated. *Id.* at 211-12.

Upon cross examination, Dr. Dunivant agreed that he could not conclude that there was not racial polarization in Red Clay; his position was that the evidence did not support a finding of racial polarization. Tr., Vol. E at 41. He also agreed that in previous voting rights litigation he had applied fewer tests and may have applied more lenient standards to data than he applied to Dr. Lichtman's results in this case. *Id.* at 57, 63.

In rebuttal to Dr. Dunivant's criticisms, Dr. Lichtman testified that the method of bounds was an acceptable procedure to use when impossible results were produced by ecological regression and he supplied literature references to support his testimony. Tr., Vol. F at 48-52. Dr. Lichtman also testified that as long as a voter's choice of a candidate was not correlated to the percentage of minority voters in the

District, the results produced by ecological regression would be reliable even if the specification test was not satisfied. *Id.* at 77. Dr. Lichtman contended that Dr. Dunivant improperly chose too high a level of statistical significance for some of the tests he performed and that by multiplying the number of tests he used, Dr. Dunivant greatly increased the likelihood that Dr. Lichtman's results would fail the tests due to pure chance. *Id.* at 64, 76. Dr. Lichtman also testified that any correlation between a voter's neighborhood and the vote for candidates with a certain position on the feeder pattern issue did not negate his findings that black voters generally vote for black candidates in greater than landslide proportions. *Id.* at 124.

*(b) Descriptive Methods*

The descriptive methods used by Dr. Lichtman included the study of scatterplots, squared correlation coefficients, extreme cases and actual results of elections with black and white candidates.

Dr. Lichtman prepared scatterplots of the 1988 Red Clay elections and the single seat exogenous elections he had studied. In general, the scatterplots depicted the percentage of votes received by the black candidate as a function of the percentage of blacks in the electorate of each district. Based upon these scatterplots, Dr. Lichtman testified that as the proportion of black voters in a district increases, the percentage of votes received by the black candidate also increases. Tr., Vol. B at 98.

Dr. Lichtman was unable to do extreme case analyses for black voters in any Red Clay election because none of the current districts in Red Clay are predominantly black. *Id.* at 46. Nine of the exogenous elections had two districts which had a black population of over 70 percent. In the

single seat elections, the black candidate received 60 percent or more of the votes in the predominantly black districts in six of these elections.[9] PX 7 at Table 1. Based upon these descriptive analyses, Dr. Lichtman concluded that the black voters of Red Clay usually exhibited strong support for a black candidate. *Id.* at 105.

Dr. Dunivant stated that a district which was only 70 percent black was not an appropriate district to use for an extreme case analysis. He suggested that a district with a black population of 90 percent or more should be used for such an analysis. DX 42 at 20-21.

The Court finds the testimony of Dr. Lichtman to be more persuasive on the issue of the political cohesion of the black voters of Red Clay. The Court finds Dr. Lichtman convincingly rebutted Dr. Dunivant's criticisms of his work. Specifically, the Court finds that the use of the method of bounds is appropriate, at least to the extent that it is used to set estimates which are within the confidence intervals produced by the regression analysis. Although there was analysis of only a single Red Clay election, the Court finds that many of the exogenous elections can be used as an indication of the political cohesiveness of the black voters of Red Clay because greater than 50 percent of the black Red Clay voters were eligible to vote in those elections.[10] The

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[9] Dr. Lichtman also studied the New Castle County district 1 results for the 192 democratic primary. The three predominantly black districts he studied in that election were outside the boundaries of the Red Clay School District. Therefore, the Court did not consider these results in this section of the analysis.

[10] With the exception of the 1984 Democratic Primary City Council District 2, 1988 Democratic Primary City Council District 2, and the

(continued...)

scatterplots do support the ecological regression results. No district with a 90 percent black population existed for Dr. Lichtman to study. Although the 70 percent districts are not as convincing as a 90 percent district would be, they do support the ecological regression work done by Dr. Lichtman. Although the feeder pattern issue may have influenced how voters in some neighborhoods voted in School Board elections, the Court is satisfied with Dr. Lichtman's demonstration that the feeder pattern analysis did not negate his finding of political cohesion among black voters.

### 2. *Lay Witness Testimony*

The Plaintiffs introduced a limited amount of lay testimony on the issue of political cohesion in the black community of Red Clay. One witness called by the Plaintiffs testified that she and a majority of the black community supported black candidates for the Red Clay School Board in the 1981, 1983 and 1985 elections. Tr., Vol. A at 84. One of the named Plaintiffs testified that when he ran for the board in 1981 and 1985 he received the support of the majority of the black community in Red Clay. *Id.* at 146. Another named Plaintiff testified that she usually voted for black candidates because she thought they would be likely to be sensitive to her concerns. *Id.* at 193.

The lay testimony was not one-sided. All three of the named Plaintiffs have supported a white candidate over a black candidate in at least one Red Clay election. Jenkins Deposition ("Depo.") at 50; Roberts Depo. at 37-38; Tr., Vol. A at 196. In the 1983 and 1988 elections, two of the

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[10/] (...continued)
1988 Democratic Primary City Council District 7 elections, the exogenous elections covered 50 percent or more of the black voting age population of Red Clay.

three named Plaintiffs voted for a white, rather than a black candidate. Roberts Depo. at 26: Tr., Vol. A at 196. Even though the lay testimony was mixed, the Court finds that in conjunction with the expert testimony it at least tends to support a finding that the black voters of Red Clay are politically cohesive.

Given the meager expert analysis of black citizens voting in Red Clay elections and the mixed lay testimony, however, the evidence of minority voter cohesion in Red Clay has not been established by clear and convincing evidence but it was sufficient to establish by a preponderance of the evidence that black voters of Red Clay usually are politically cohesive. The Court, therefore, concludes that the Plaintiffs have established the second factor of the Gingles analysis.

C. White Bloc Voting

There was expert and lay testimony introduced on the issue of white bloc voting. In making a finding on the issue of white bloc voting the Court must consider whether the white voters of Red Clay vote in a manner which usually allows the white majority to defeat the black voters' choice of candidate.

*1. Expert Testimony*

*(a) Inferential Techniques*

The Plaintiff's expert, Dr. Lichtman, relied upon the 1988 Red Clay Election regression analysis and the exogenous election analyses discussed in the previous section to reach a conclusion on white bloc voting. He testified that these results indicated that the white voters of Red Clay usually voted as a bloc to defeat the black voters' choice of

candidate. Tr., Vol. B at 126. Dr. Dunivant raised the same criticisms to this conclusion as he did on the issue of political cohesion of the black community.

The Court finds that Dr. Dunivant's criticism of using exogenous elections to predict the voting patterns of white Red Clay voters is well taken. In contrast to the black community of Red Clay where over 50 percent of the voters were eligible to vote in the exogenous elections, less than 21 percent of the white Red Clay electorate were eligible to vote in those same elections. DX 42 at G. In three of the exogenous elections, less than 10 percent of the white Red Clay electorate was eligible to vote. *Id.* In addition, the exogenous elections generally covered districts within the city of Wilmington and most of the white Red Clay electorate lives in the suburban areas of the District. Considering the limited pool from which information may be gleaned and other factors testified to by Dr. Dunivant, the Court finds that the Plaintiffs have failed to establish that the exogenous elections are representative of the voting patterns of the white Red Clay electorate.

The one Red Clay election analyzed by ecological regression does show that only 1 percent of the white voters of Red Clay voted for the black candidate. The black candidate was defeated in the 1988 election. Results from one election do not show that white voters *usually* vote in a way to defeat the black voters' choice of candidate. The Court finds that the regression analysis, standing alone, does not establish that there is white bloc voting in the Red Clay elections.

*(b) Descriptive Techniques*

In studying the voting patterns of the white citizens of Red Clay, Dr. Lichtman studied scatterplots, extreme case results, and calculated the maximum white vote for the black candidate in the 1983 and 1985 Red Clay elections. The Court has discussed the scatterplots in the section on racial polarization *supra*. With the exception of the analysis of the 1988 Red Clay election, these scatterplots and extreme case analyses represent results from the exogenous elections. The Court has found these exogenous elections are not reliable indicators of the voting pattern of the white Red Clay electorate, therefore, the Court finds that the scatterplots and extreme case analyses of these exogenous elections cannot be relied upon to find white bloc voting in Red Clay.

Dr. Lichtman performed extreme case analyses on the 1983, 1985 and 1988 Red Clay elections. Those results are summarized in the following table:

Percentage of Vote Cast For the Black Candidate[11/]

| Election | 90%+ White Polling Places | Other Polling Places |
|---|---|---|
| 1988 | 4 | 27 |
| 1985 | 38 | 72 |
| 1983 District A | 16 | 67 |
| 1983 District D | 15 | 59. |

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11/ These results are taken from PX 7 at Table 7.

In order to make these calculations, Dr. Lichtman had to assume that the proportions of the white voters in those polling places in the 1983 and 1985 elections were overwhelmingly white as was the proportion of the white voters in those polling places in the 1988 election. Tr., Vol. B at 77.

In his report, Dr. Dunivant stated that such an assumption was "very suspect" because the voter turnout for these polling places ranged from 1.6 percent in 1983 to 6.9 percent in 1988. DX 42 at 22. Dr. Dunivant stated that even if it was valid to assume that the composition of the neighborhoods was the same, which he apparently was not conceding, it was not valid to assume that the turnout by race was the same in each election given the wide variety in turnout range. DX 42 at 22.

Dr. Dunivant's reasoning on this point is persuasive. The Court finds that the allegedly extreme case results reported from the 1983 and 1985 elections are not reliable because there is no substantial evidence that the racial composition of those districts has not changed in recent years. Nor is there any evidence that the turnout out by race was the same in 1983 and 1985 as it was in 1988 and 1989.

Dr. Lichtman also conducted an extreme case analysis for one additional exogenous election, the 1982 New Castle County District 1 election. Ten percent of the electorate in this exogenous election were not residents of the Red Clay School District. Dr. Lichtman testified that this election result was valuable in spite of the fact that it includes voters from outside Red Clay because a majority of the white voters of Red Clay were eligible to vote in the District 1 election. Tr., Vol. B at 106-07. Dr. Lichtman's extreme case analysis indicated that 20 percent of voters in the predominantly white districts in that election voted for the

black candidate. In contrast 63 percent of the voters in the predominantly back districts, which were outside the Red Clay School District, voted for the black candidate in the District 1 election. PX 7 at 29.[12/]

This analysis establishes that 80 percent of the citizens in the predominantly white districts did not vote for the black candidate. It does not, however, provide an indication of which candidate would have been the preferred candidate of black Red Clay voters. Because the Court cannot determine if the predominantly white districts are voting against the candidate which would be preferred by black Red Clay voters, the Court finds this result to be of little value in establishing white bloc voting in Red Clay elections.

Finally, Dr. Lichtman calculated the theoretical mathematical maximum of white voters who voted for the black candidates in the 1981, 1983, 1985 and 1988 Red Clay elections. He testified that the theoretical maximum of white vote for the black candidate could be calculated by assuming that every vote the black candidate received came from a white voter. Tr., Vol. B at 80. He did this calculation two different ways. On calculation assumed blacks voted in equal proportions to whites and one calculation assumed the black voter turnout was twice the white voter turnout. His results are summarized in the following table:

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[12/] The predominantly white districts had a white population exceeding 90 percent. The predominantly black districts had a black population exceeding 70 percent.

Theoretical Maximum White Vote For Black Candidate[13/]

| Election | Equal Turnout | Black Turnout 2X White Turnout |
|---|---|---|
| 1981 Dist. A | 17% | 18% |
| 1981 Dist. B | 42% | not calculated[14/] |
| 1981 Dist. E | 19% | 21% |
| 1983 Dist. A | 30% | 34% |
| 1983 Dist. D | 27% | 30% |
| 1985 Dist. B | 53% | 59% |
| 1988 Dist. A | 9% | 10%. |

Dr. Lichtman testified that the actual white vote for the black candidate was probably substantially less because this analysis assumed that no blacks voted for the black candidate and assumed black voter turnout to be equal to or greater than white voter turnout. *Id.* at 79.

The Court notes that a candidate need not receive 50 percent of the white vote to win an election in Red Clay when more than two candidates are running for a seat. Therefore, a finding of white bloc voting cannot be based upon the observation that usually less than 50 percent of the

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13/ These results are compiled from PX 7 at 43-50.

14/ In his report, Dr. Lichtman calculated these numbers for the elections in which the black candidate had lost and did not do the calculation for the election where the black candidate had won. During cross-examination, he calculated one of these values. PX 7 at 43-50; Tr., Vol. B at 197.

white candidates favor the black candidate. Assuming equal turnout of black and white voters, the white vote for the black candidate ranged from a low of 9 percent to a high of 53 percent. The Court finds that these varied results do not indicate a consistent pattern of whites voting against the black candidate. Furthermore, the Court is not convinced that all of these black candidates were the preferred candidates of the black community. The Voting Rights Act is designed to protect the minority voter not the minority candidate. Only the 1988 election has received extensive analysis by the experts. The lay testimony regarding the 1983 elections is contradictory. The Court finds that the expert testimony does not establish that the white citizens of Red Clay usually vote in a manner which defeats the black citizens' choice of candidate.

### 2. *Lay Testimony*

The lay testimony on the issue of white bloc voting focused primarily upon the exogenous elections. For example, a campaign manager testified that in one of the exogenous elections she worked for a white candidate and attempted to target the white vote to wrest as much of it as possible from the other white candidate. Tr., Vol. A at 178-80. Because the Court has found that the exogenous elections are not reliable indications of the voting patterns of the white Red Clay electorate, lay testimony regarding these elections is also of limited usefulness.

The Court concludes that the Plaintiffs have failed to establish by a preponderance of the evidence white bloc voting in the Red Clay elections. Because the Plaintiffs have failed to prove the three *Gingles* factors, their claim must fail. In the interests of providing a comprehensive opinion, however, the Court will consider the remaining factors outlined in the Senate Report.

III. *Other Senate Factors*

A. History of Discrimination Touching Right to Vote and the Impact of Historical Discrimination in Other Areas (Senate Factors Nos. 1 & 5)

There is no evidence of official discrimination in the Red Clay School District or in New Castle County subsequent to 1970. The State of Delaware, however, like other states in the South Atlantic Region of the country, has a history of official discrimination against black citizens, including discrimination concerning voting. As is commonly known, most of the state was slave territory until slavery was abolished by passage of the 13th Amendment to the United States Constitution. Prior to the adoption of the 15th Amendment to the Constitution, black citizens could not vote. Del. Const. Art. 4, Sec. 1. Delaware's legislature vehemently resisted passage and enforcement of the 15th Amendment. *See, e.g.*, R. Kluger, *Simple Justice* 426 (2d ed. 1977).

Poll taxes and literacy tests were enforced to deny black citizens the right to vote. *See, e.g.*, Hancock, "Delaware, 1865-1914" at 186-817 in Reed, *Delaware: A History of the First State* (1947); Debates and Proceedings of the Constitutional Convention of the State of Delaware, 1896-1897 at 347. The poll tax was eliminated by amendment to the Delaware constitution in 1897. Del. Const. Art. V, Sec 2. Literacy tests were abolished in 1970 when the United States Congress suspended such tests nationwide. 42 U.S.C. § 1973aa.

The Court takes judicial notice that the State of Delaware has a history of public and private discrimination against blacks in many other areas including: education,

housing, employment and public accommodations. For example, *de jure* segregation existed in the Delaware public schools until the Supreme Court decision of *Brown v. Board of Education* in 1954. The history of the litigation involving desegregation of the public schools in Delaware is summarized in a recent opinion, *Coalition to Save Our Children v. Board of Education*, 757 F.Supp. 328, 329-30 (D.Del. 1991). Prior to the Supreme Court decision in Brown, blacks were also denied admission to the University of Delaware. Black students wishing to pursue graduate studies had to do so outside of the state. Johnson Depo. at 87.

Based upon the 1980 census data, one of the Plaintiffs' experts, Dr. O'Hare, testified that in 1979 and 1980, the median income of black families in New Castle County was only a little more than half of the median income of white families. He testified that approximately half of the adult black population in New Castle County had finished high school. Roughly three-quarters of the adult white population had completed high school. Twice as many white adults had completed four years of college as compared to black adults. The unemployment rate among blacks was twice the unemployment rate among whites. Over one quarter of black households did not have a car as compared to less than 10 percent of white households. Over 10 percent of black households did not have a telephone compared to approximately 2-1/2 percent of white households. Tr., Vol. A at 45-51.

This testimony paints a dismal picture of past discrimination in the State of Delaware and of economic disparities in New Castle County. The Court must consider whether this history of discrimination and the current economic disparity hinders the Red Clay black citizens' ability to participate in the election process. Dr. O'Hare testified that these disparities in income and education are

associated with lower rates of political participation. Dr. O'Hare testified that in the November, 1988, General Election, 62 percent of the whites and 40 percent of the non-whites in the State of Delaware participated in that election. *Id.* at 54.[15] This testimony was corroborated by turnout rates in the elections studied by Dr. Lichtman. Tr., Vol. B at 159-61; PX 9. Dr. Lichtman also found that in the 1988 primary for the City of Wilmington, 28 percent of the white voting age population turned out for the election while only 14 percent of the black voting age population turned out for the election. PX 9.

Significantly, the turnouts for black and white citizens for the 1988 Red Clay election were much closer. The turnout for white voters was 7 percent of the white voting age population. The turn out for black voters was 5 percent of the black voting age population. PX 9. The Court cannot determine whether this relative equality in turnout rate is due to a generally depressed turn out of all voters or due to some of the features of the Red Clay election, such as no registration requirement or multiple polling places. The Court need not understand the cause, however, to find that the rates are roughly similar. The Court finds that any lingering effect of discrimination against blacks in Delaware is not producing a disparate turnout rate for black citizens in Red Clay elections.

The expenditures and effort necessary to mount a successful campaigning in Red Clay have varied. Several successful candidates have spent less than fifty dollars of personal funds. PX 55 at Interrogatory 4; PX 59 at Interrogatory 4; PX 61 at Interrogatory 4. Other successful

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[15] Blacks constitute 90 percent of all non-whites in Delaware. Tr., Vol. A at 54; PX-14, Table H.

candidates have spent four hundred dollars or more of their personal funds. PX 60 at 4. Total expenditures for successful campaigns have ranged from one hundred dollars to two thousand five hundred dollars. PX 54 at Interrogatory 4; PX 55 at Interrogatory 4. Winning candidates have had between fifteen and one hundred twenty-five people helping them with their campaigns. PX 55 at Interrogatory 4; PX 57 at Interrogatory 4.

Although these expenditures are not insignificant, the evidence indicates that economics has not barred black citizens from running in and winning Red Clay elections. Since 1981, ten out of seventy-five, or roughly 13 percent, of the candidates running for positions on the Red Clay school board have been black. This is comparable to the percentage of black citizens in the Red Clay population. Three of these candidates have been successful. The Court finds that the vestiges of discrimination, such as differences in median income between the white and black citizens of Red Clay, do note create a significant impediment to black citizens participating in the electoral process of the Red Clay School District.

The Court concludes that although there has been official and private discrimination against black citizens in Delaware and New Castle County, the Plaintiffs have failed to show by a preponderance of the evidence that the lingering effects of this discrimination play a significant role in impeding black citizens' ability to participate in the Red Clay School Board elections.

B. Practices Enhancing the Opportunity for Discrimination (Senate Report Factor No. 3)

The parties dispute whether the features of the Red Clay election process, other than the at-large feature,

enhance the opportunity for discrimination against minority citizens. The Red Clay district covers an area approximately fifteen miles wide and fifteen miles long. See Stipulated Exhibit ("SX") 2 at 22; SX 3. It is the second largest school district in Delaware and the largest district in New Castle County. Plaintiffs' Rebuttal Exhibit ("PRX") 18 at 4. The parties agree that the size of the district increases the expense and difficulty of campaigning in an at-large election. The Plaintiffs argue that the large district impedes black candidates more than white candidates because blacks generally have lower incomes.

While this may be a large district by Delaware standards, it is not unusually large when compared to districts in other reported section 2 cases. For example, the district in *Garza v. County of Los Angeles*, 756 F.Supp. 1298, 1341-42 (C.D.Cal. 1990), *cert. denied*, 111 S.Ct. 681 (1991), was twice the size of the State of Delaware. Incumbents amassed millions of dollars in contributions which required candidates to make significant financial expenditures to run a successful campaign.

In Red Clay, candidates are invited to attend "Meet the Candidates Nights" in many of the neighborhoods in the District Church groups and neighborhood groups are active in supporting candidates for election to the School Board. *See, e.g.*, Tr., Vol. A at 82, 155. The newspaper often prints editorials and other articles regarding the elections. *See, e.g.*, PX 49; DX 39. Therefore, there are many ways for a candidate to receive exposure without expending large sums of money. The Court finds that given the community involvement in the School Board elections, the size of the election district in Red Clay is not large enough to be a source of discrimination against black citizens.

Candidates in Red Clay must run for assigned seats. This system fosters slating which has helped two black candidates win seats on the Red Clay School Board. *See* Slating section, *infra*. This system also ensures that citizens from each district within Red Clay, including the districts with large minority populations, will have representation on the School Board. The assigned post system also prevents the use of single shot voting, which does make it more difficult for minority citizens to elect the candidate of their choice. Given the beneficial and detrimental aspects of the assigned posts, the Court finds that this feature of the election system does not clearly work in favor or against minority voters.

Candidates need only a plurality of votes to win an election in Red Clay. The Plaintiffs argue that as a practical matter, candidates rarely win with a mere plurality of votes. Given that occasionally there are elections involving multiple candidates, the Court finds that this feature will sometimes benefit minority voters. Furthermore, it clearly does not provide an opportunity for discrimination.

There is no voter registration requirement for the Red Clay elections. The Defendants argue that this factor favors minority voter participation. The Plaintiffs argue that because there is still a disparity between black and white voter turnout in Red Clay, this factor does not aid the black citizens. While this evidence will not support a finding that this feature is a cause of greater minority turnout, it is clear that this feature does not provide an opportunity for discrimination against black citizens of Red Clay.

The Plaintiffs contend that the Board's practice of holding elections on Tuesdays rather than Saturdays makes it disproportionately difficult for black citizens to vote. The Plaintiffs base this argument upon the assumption that it will

be more difficult for black citizens than white citizens to leave their jobs to vote. When the elections are held on Tuesdays, the polls are open well into the evening. *See, e.g.*, SX 29 at 2, 3 (campaign literature for 1987 and 1988 races indicates that polls are open from noon until 9 p.m.). Citizens can vote at any polling place within the district. Given the hours the polls are open and the multitude of polling places in the District, the Court finds that holding Tuesday elections rather than Saturday elections does not enhance the opportunity for discrimination against black citizens.

The elections are held in May rather than in November. This generally results in a low voter turn out. The Plaintiffs argue that the low voter turn out effects voters in an equivalent manner and does not enhance the opportunity for discrimination against black citizens.

The Court finds that on the whole, the Plaintiffs have failed to prove by a preponderance of the evidence that the features of the Red Clay election system enhance the opportunity for discrimination against black citizens.

C. Slating (Senate Factor No. 4)

Several informal slating processes have operated in the Red Clay elections. For example, in the first Red Clay elections, the successful black candidate was included on an informal slate with several white candidates. Tr., Vol. G at 4. Since 1985, slating has been organized around the feeder pattern issue. Tr., Vol. D at 7. Jackson Depo. at 90. A group called "Citizens United for Education" has supported candidates who favored feeder pattern changes. Its membership is predominantly, although not exclusively white. Jenkins Depo. at 5, 26, 59. "Neighborhoods Working Together", another slating group, supported candidates who

oppose mandatory feeder pattern changes. Tr., Vol. G at 29-35, 65. Some of its members supported the successful black candidate in the 1990 election. Id. at 6, 40-42. The Coalition to Save Our Children has a predominantly black membership. Although it does not raise funds for elections, it is active in Red Clay school board elections. Tr., Vol. A at 66-68, 71-72; Vol. C at 10-11, 157; Vol. D at 17. The Coalition has endorsed candidates and worked to get the vote out in the black community. Roberts Depo. at 15.

The Plaintiffs suggest the slating system in Red Clay has been closed to black candidates because the membership in "Neighborhoods Working Together" and "Citizens United for Education" is predominantly white and these organizations did not sponsor a black candidate until after this lawsuit was initiated. The Plaintiffs also argue that the Coalition to Save Our Children is at a disadvantage as a slating organization because it does not have campaign funds.

In a district that is approximately 87 percent white, it is not surprising that many neighborhood organizations are predominantly white. The racial composition of a group, standing alone, will not support an inference that the group excluded black citizens. Despite the Plaintiffs' arguments, there is evidence in the record showing that black candidates have been slated with white candidates in 1981 and 1990. The evidence will not support a finding that the pending lawsuit influenced the 1990 slate. Nor is there any evidence to suggest that a black candidate asked for and was denied access to a slate in any other year. As the Court has previously discussed, the availability of funds is an important but not a conclusive factor in the Red Clay elections. The Court finds that the Plaintiffs have failed to prove by a preponderance of the evidence that black candidates were denied access to slating processes in Red Clay.

D. Overt or Subtle Racial Appeals in Campaigns (Senate Factor No. 6)

The Plaintiffs rely on three pieces of evidence to support their argument that the elections in Red Clay contained racial appeals: two newspaper articles from 1985, PX 37, PX 38, and a campaign flyer from 1988, SX 29 at 7. The Defendants deny that the articles and the flyer constitute credible evidence of racial appeals.

A newspaper article dated May 6, 1985, published pictures of the candidates and stated that race may be an issue in the 1985 election. It identified Roberts as the only black board member on the Red Clay School board and quoted Roberts as saying that he was concerned that the black vote might be split between Amos, another black candidate and himself. This would allow Eckman, the white candidate, to win the election. PX 37 at 3.

A newspaper article dated May 12, 1985 indicated that Roberts had lost the election and stated that: "Because Roberts is black and Eckman is white, race became an issue in the election." PX 38 at 2.

Certainly, the May 6, 1985, article can hardly be used to establish racial appeal. The second article, in the absence of more, is a conclusory statement without foundation in the record. Even accepting it as fact proves very little. Furthermore, although a court has considered newspaper articles to make a finding of racial appeals in *Williams v. Dallas*, 734 F.Supp. 1317 (N.D.Tex. 1990), the rationale relied upon by that court does not fit the facts in the present case. In a footnote, the *Williams* court cited a law journal article, stating that:

> *racial appeals* occur in a campaign if one candidate calls attention to the race of his opponent or his opponent's supporters (e.g., where a white candidate uses a picture of his black opponent in his own campaigning material) - or if media covering a campaign disproportionately calls attention to the race of one candidate or that candidate's supporters (e.g., "racial telegraphing" by contrasting a white "civic leader" against a "black activist" opponent).

*Williams*, 734 F.Supp. at 1360 n. 119 (emphasis in original) (quoting Grofman, Migalski and Noviello, *"The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective"*, 7 Law & Policy 199, 214 (April 1985).

In the newspaper articles the black and white candidates are not referred to in any disparaging manner and not in a way that could be described as decisive, such as civic leader or activist. To the extent that either candidate is making an issue of race, it appears that the subject was brought up by Roberts, one of the black candidates and a named Plaintiff in this lawsuit. The Court does not find this to be the type of evidence of racial appeals that was before the court in *Williams*.

The third piece of evidence is a flyer from the 1988 election for district A. In that election, one candidate opposed feeder pattern changes and the other two candidates favored feeder pattern changes. Two of the candidates were white and one was black. The flyer states in pertinent part:

> SKYLINE IS OVERCROWDED, STANTON IS OVERCROWDED, HERITAGE IS OVER-

CROWDED, WARNER IS OVERCROWDED, AND TO TOP IT ALL OFF, DICKINSON AND MC-KEAN ARE GROWING MORE WHITE AND WILMINGTON HIGH IS BEGGING FOR WHITE STUDENTS.

ROBERT MITCHELL HAS SAID OVER AND OVER AGAIN THAT HE WILL DO ANY-THING TO GET MORE STUDENTS TO ATTEND WILMINGTON HIGH. HE DOESN'T CARE WHERE THEY COME FROM. THIS MEANS FEEDER PATTERN CHANGES! J. J. NUTTALL FAVORS WIDE-SPREAD FEEDER PATTERN CHANGES ALSO. HE, TOO, DOESN'T CARE WHERE THE STUDENTS COME FROM. BOTH KNOW THAT THE NEW DEVELOPMENTS LIE WITHIN OUR FEEDER PATTERN. THE PER-CENTAGE OF *MINORITIES AT A.I. DUPONT HIGH* IS *24% AND INCREASING*, AT *MCKEAN IT'S 27% AND FALLING* AND AT *DICKINSON IT'S 34% AND FALLING. DON'T BE MISLED* INTO THINKING THAT MCKEAN AND DICKIN-SON WOULDN'T BE CALLED UPON FOR FEEDER PATTERN CHANGES--THEY WOULD, AND THE RESULT WOULD BE *MAJOR DISRUP-TION* FOR OUR CHILDREN!!!

*BILL MANNING* IS THE ONLY CANDI-DATE WHO HAS SAID OVER AND OVER AGAIN THAT HE *FAVORS STABILITY.* TO DEAL WITH OVERCROWDING, HE SUPPORTS CHANGE WITHIN OUR SAME FEEDERS, KEEP-ING OUR CHILDREN TOGETHER. TO DEAL WITH RACIAL DIFFERENCES, HE FAVORS PROGRAMS TO ATTRACT STUDENTS BACK INTO THE PUBLIC SCHOOLS WITHIN THEIR

> FEEDER. HE FEELS THAT MAKING FEEDER PATTERN CHANGES IS THE LEAST CREATIVE AND MOST DISRUPTIVE SOLUTION TO THE DISTRICT'S PROBLEM.

SX 29 at 7 (emphasis in original).

The Plaintiffs argue that the flyer is evidence of a racial appeal because it is harsher on the black candidate than the white candidate. The Plaintiffs also argue that the appeals like the one in the flyer tend to incite racial fears to the detriment of minorities. Manning stated that he did not learn of the flyer until after the election and would not have approved of it because he believed it misled voters about his opponents' positions and was acrimonious. Manning Depo. at 77-78.

The flyer uses words like white and minority. It would be difficult, however, to talk about the feeder pattern issue without using such terms. The flyer is addressing an issue that is a major concern to black and white residents in the Red Clay School District. Although the tone of the flyer is shrill, it does not malign one of the candidates or his supporters because of race. Without knowing the race of the candidates, a voter reading the flyer would not able to determine that Mitchell was black and Nuttall and Manning were white. The Court disagrees with the Plaintiffs' characterization of the flyer. The flyer may be misleading or acrimonious but the Court finds no evidence of overt or subtle racial appeal in the flyer.

Because the Court can find no credible evidence of subtle or overt racial appeals in the three pieces of evidence submitted by the Plaintiffs on this issue, the Court finds that the Plaintiffs have failed to prove by a preponderance of the

evidence that there have been overt or subtle racial appeals in the Red Clay School District Elections.

E. Tenuousness of Policy Supporting At-Large Voting (Additional Senate Report Factor)

The at-large election method was established by the State Board of Education with Court approval. D.I. 84, ¶¶5, 6. With the exception of the Indian River School District, every district in the state elects board members in at-large elections. D.I. 84, ¶6. There have been at least three attempts to legislatively change the at-large system of election to a single member system. *See* SX 26; SX 27; SX 28. These attempts have failed.

In March of 1989 the State Department of Public Instruction published a study of school board election laws in Delaware. A majority of the study committee favored maintaining the at-large method of election. PX 35 at 10. The study identified two arguments favoring at-large elections. In theory, board members elected at-large need votes from every neighborhood and are accountable to all voters not just voters from their nominating districts. At-large elections also allow voters to vote each year rather than every fifth year. *Id.*

The Plaintiffs argue that the at-large system is tenuous because there is a school district in Delaware which elects board members from single districts. The Plaintiffs also argue that the policy is tenuous because most of the members of the New Castle County Council are elected from single-member districts and the members of the Wilmington City Council are elected from a combination of single-member and at-large districts. D.I. 84, ¶47.

The Court does not find the Plaintiffs' arguments persuasive. The fact that one of sixteen school districts elects their board members from single member districts does not rebut the policies outlined in the report. This is especially true when the Court has been given no evidence of similarities or differences between the Indian River District and the Red Clay District. The Court finds no similarities between the County or City Council and the Red Clay School District which suggest that the County and City election systems are proof that the District election system is tenuous.

The Delaware legislature has repeatedly considered the at-large election system used in the schools in Delaware. Specific policies supporting the at-large elections have been identified. Reasonable minds may differ about whether or not the at-large election system fosters the policies outlined by the state. Such disagreement, however, does not equate to a finding of tenuousness. The Court finds that the Plaintiffs have failed to prove by a preponderance of the evidence that the policies supporting the at-large election system in Red Clay are tenuous.

F. Responsiveness to Minority Concerns (additional Senate Report Factor

The Plaintiffs contend that the Board has been unresponsive to minority concerns. They cite the findings in *Coalition to Save Our Children*, 757 F.Supp. at 342-46, 354-58, to support their position that the Board has acted to alleviate the racial imbalance in Red Clay Schools only after repeated prodding and a direct order from the State Board. The Plaintiffs also argue that the Board has failed to respond to certain "substantive concerns", such as high rates of suspensions and assignment to special education among black students, low test score performance by black students, high

drop out rate of black students, and low college matriculation among black students. The Plaintiffs contend that it has been difficult for members of the Coalition to meet with the Board to discuss their concerns. They argue that many of the Board members cannot identify with concerns of the black community and this is an indication of a lack of responsiveness.

The Defendants insist that the Board has been responsive to minorities. They argue that from its inception in 1981, there have been members on the Board who have been effective advocates for minority concerns. The Defendants note that black professional have been hired in key leadership positions in Red Clay. For example both of the superintendents for the District have been black. The percentage of black teachers, principals and other professionals on the staff generally exceeds the percentage of black population in the District. DX 27; Tr., Vol. C at 85-90. The current director of special services is also black, The Defendants contend that the Board has given a great deal of attention to the overcrowding and racial balance issues but has disagreed with the Plaintiffs on how to resolve these issues. The Defendants contend that the substantive concerns identified by the Coalition are not due to discrimination by the Board and the District is giving special attention to these problems.

The evidence presented at trial established that while changing feeder patterns in the abstract was not too controversial, each particular plan was unpopular, drawing criticism from both minority and white citizens. Tr., Vol. C at 139-43. Dr. Johnson, the superintendent of the District at that time, informed the Board as early as 1984 that the overcrowding and racial imbalance in the schools was becoming so severe that it would require some board action, probably feeder pattern changes, in order to correct the

problem. D.I. 84, ¶31. Neither the initial plan proposed by Dr. Johnson nor the amended plans he proposed were adopted by the Board. *Id.*, ¶32.

In 1985, a citizen committee, Building Utilization Advisory Committee ("BUAC"), was established by the Board to study the problem. *Id.*, ¶33. During 1985 and 1986, BUAC developed many options for feeder pattern changes. Two of the plans were supported by a majority of the committee members. Neither plan received a majority of Board support. *Id.*, ¶34.

In 1988, the use of a magnet school plan to promote voluntary student movement was proposed by the Board. The State Board of Education did not approve of the idea. *Id.*, ¶37. In May of 1989, the State Board of Education sent a letter to the Red Clay School District insisting that the racial composition disparities of the schools be corrected by the fall of 1991. *Id.*, ¶39. Beginning in September of 1990, the Red Clay School Board advanced several versions of its CHOICE plan to the State Board of Education. The Red Clay School Board unanimously supported these plans. *Id.*, ¶41. A version of this plan, modified by the Delaware State Board of Education and the Federal District Court was eventually approved by Court Order in February, 1991.[16]

Thus, it has taken the Board seven years to develop a plan which may solve the problem of racially identifiable schools within the District. The Court realizes that the Board's decision was a difficult one. The Court finds, however, that the seven year time lag on an issue which is of extreme importance to the black community is indicative of a lack of responsiveness to minority concerns.

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[16] In the absence of federal funding, it could not be implemented.

With regard to the "substantive concerns" of the Coalition, there was no evidence at trial to suggest that black students were being placed in special eduction programs on a discriminatory basis. The Director of Special Services testified that he has been working to lower the number of black students who are placed in special education. His efforts have included ensuring the staff is properly trained so that students are not inappropriately placed in special education. Tr., Vol. C at 123. Nor was there any evidence at trial to suggest that a Board policy was the source of the disproportionate suspensions, high absenteeism or low test scores of black students. Although the Plaintiffs' list of substantive concerns paint a disparaging picture of the state of eduction in the Red Clay School District, the Plaintiffs have failed to introduce enough evidence to show that the Board is unresponsive to these concerns.

Plaintiffs' argument that the Board's reluctance to meet with the Coalition as evidence of the Board's insensitivity to minority concerns is not persuasive. The Court heard testimony that the Plaintiffs rarely attended regularly scheduled public meetings of the Board. Instead, they sought and attended private, specially schedule meetings between the Coalition and the Board in order to express their concerns. Tr., Vol. G at 59-60. The failure of the Plaintiffs to use the public meetings as a mechanism of communication with the Board makes it difficult for the Court to find that the Board was unresponsive because it did not schedule as many special meetings with the Coalition as the Plaintiffs thought appropriate.

The Court finds that certain individual Board members have been strong advocates for minority concerns. Several of the Board members, however, testified that they did not know whether or not Delaware had operated segregated schools or whether there was a history of discrimina-

tion against blacks in Delaware. Tr., Vol. C at 19-20. Other board members were unfamiliar with the substantive concerns expressed by the coalition. Allen Depo. at 27; Manning Depo. at 41-42. While a Board could be responsive to the current concerns of minority citizens without an awareness of the past problems of the minority groups, the Court believes it would be difficult for Board members to remain ignorant of current minority concerns if the Board were actively attempting to meet those concerns. Therefore, the Court finds that the inability of individual board members to identify issues of current concern to the minority community indicates a lack of responsiveness by the Board

The Court finds that the Plaintiffs have established by a preponderance of the evidence that the Board has not been responsive to certain concerns of the minority community.

IV. *The Totality of the Circumstances*

The Court is troubled by the Plaintiffs' evidence that the Board has been unresponsive to the needs of minority students in the Red Clay School District. The Court understands that moving children is a controversial and difficult issue to resolve. It is the responsibility of the Board, however, to make the difficult decisions which are necessary to ensure that all children in the District have access to an equal eduction. The Board's hesitance to make the difficult decisions in the period from 1984 through the present has been the fuel for continuing litigation in the desegregation suit. The Court suspects the Plaintiffs' frustration with the Board regarding the growing racial imbalance in the schools and the "substantive issues" identified by the Coalition have played an important part in this litigation as well.

The concerns of the Plaintiff Class are for the most part legitimate concerns but they are not concerns that, for the most part, can be accomplished through the application of the Voting Rights Act. In sum, the record in this case does not support a violation of that Act. The evidence relating to some elements of the charge were compelling but, more importantly, in other respects, it was woefully weak. There is no long history of a failure of black candidates to be elected to the Board. There is not evidence that black candidates have been denied access to the informal slating processes in the District. The election system was not set up with any intent to dilute the minority vote. The reasons for the at-large election system are not tenuous. Finally, the other features of the election system do not offer an opportunity for discrimination against black voters. The timing of this law suit may very well have been the crucial factor in the Court's decision because it was the available evidence which failed to sustain Plaintiffs' burden of proof

Even if the Court had concluded that the Plaintiffs had satisfied the three *Gingles* factors, the Plaintiffs have not established a violation when the totality of the circumstances are considered. The Court concludes that the Plaintiffs have failed to establish that the current system of at-large elections to the Red Clay School Board violates Section 2 of the Voting Rights Act.

Supreme Court, U.S.
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No. 93-812

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,
*Petitioners*,

v.

ALDEN JENKINS, *et al.*,
*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the decision of the Third Circuit, which remanded this case to the district court for further consideration of issues relevant to the liability determination, is ripe for review by this Court at this time.

2. Whether the Court of Appeals acted properly in remanding this case to the district court for further proceedings on plaintiffs' claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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Respondents submit this brief in opposition to the petition for writ of certiorari.

## STATEMENT OF THE CASE

Plaintiff-respondents, black voters in the Red Clay Consolidated School District in Delaware, filed this class action in May 1989 challenging the use of at-large elections to elect the members of the Red Clay School Board. Plaintiffs alleged that at-large voting dilutes black voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Following a trial in April and May, 1991, the district court found that the black population of the school district is sufficiently large and geographically compact that if the district were subdivided, a majority black single-member district could be created. Pet. App. 81a-82a. The court also found that black voters in Red Clay were politically cohesive, usually voting for black candidates in elections in which black candidates ran for office. Pet. App. 82a-91a.

White voters in Red Clay, by contrast, rarely supported black candidates. The district court credited calculations showing that in seven black-vs.-white school board elections since 1981, on average no more than 28% of white voters could have voted for black candidates. Pet. App. 95a-97a, 28a-29a. The defendants did not dispute these calculations.[1]

As a result, prior to the filing of this lawsuit only one black candidate had succeeded in winning election to the Red Clay School Board, winning by a plurality of the vote in an election where he was the only black candidate opposing five white candidates. Pet. App. 71a, 33a, 55a. Running as an incumbent in 1985, this black representative was defeated in a head-to-head race against one white opponent, despite substantial support from black voters. Pet. App. 28a, 71a, 90a. From 1985 through 1990, no black representative sat on the school board. In 1990, after the filing of this lawsuit, a black candidate was elected because, for the first time ever in Red Clay, no white candidate filed for the seat. Pet. App. 79a, 8a-9a. In sum, six of the seven black school board candidates who ran against white opponents were defeated

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[1] The calculations were based on the actual vote totals obtained by black candidates, assuming, for the sake of analysis, that all of the votes they received were cast by white voters—that is, assuming the maximum possible degree of white crossover voting. For a full explanation of these calculations, *see* Pet. App. 27a-29a, 95a-96a.

in elections held in 1981, 1983, 1985, and 1988. Pet. App. 71a-72a.[2] The district court found that there had been some underrepresentation of black citizens on the school board and that the elections of the successful black candidates in 1981 and 1990 may have occurred under unusual circumstances. Pet. App. 81a, 57a.

Despite these findings, the district court held that plaintiffs had failed to prove a Section 2 violation because they failed to demonstrate legally significant white bloc voting as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986). The district court ruled that the white bloc voting demonstrated by plaintiffs' analysis of school board elections was not legally significant because black candidates might be able to win election without obtaining a majority of the white vote. Pet. App. 96a. Such a victory would be possible, for example, if three or more candidates enter a race and the white candidates split the white vote, allowing the black candidates to win with a plurality. *See* Pet. App. 29a. The district court ruled against plaintiffs on this ground although no candidate, black or white, had won a school board election with a plurality of the vote since 1981. Pet. App. 33a.[3]

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[2] In 1991, after the trial of the case but before the district court's decision, another black candidate was elected to a special one-year term to fill a vacancy. The term has expired and the candidate is no longer serving on the school board. Pet. App. 77a, 7a, 9a. The record contains no evidence of the circumstances surrounding the 1991 election, although the Court of Appeals' decision permits the parties to submit evidence on this election on remand. Pet. App. 66a-67a.

[3] The district court also assessed other factors that are "supportive of, but *not essential to*," a showing of a Section 2 violation (the "Senate Report" factors). *Thornburg v. Gingles*, 478 U.S. at 48 n.15 (emphasis in original); *see* S. Rep. No. 97-417, 97th Cong., 2d Sess. at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 206-07. The district court ruled that the Red Clay School Board had been unresponsive to the interests of black citizens in important respects. Pet. App. 111a-113a. The Court also found that there had been a lengthy history of official discrimina-

In a decision issued August 19, 1993, the Third Circuit unanimously reversed and remanded the case for further consideration, holding that the district court erred in ruling that persistent white bloc voting against black candidates was not legally significant under *Gingles* factor III merely because a black candidate might be able to win with a plurality of the vote if more than two candidates run. Reliance on this plurality-win theory, the Court held, conflicts with *Gingles*' requirement of a "searching practical evaluation of the past and present reality," 478 U.S. at 45 (citation and internal quotations omitted), because in Red Clay no candidate has won a school board election with a mere pluralty of the vote for more than ten years. Pet. App. 32a-35a.[4] As the Court stated:

> [T]he district court erred in focusing on the potential for Red Clay's plurality scheme to aid minority-preferred candidates rather than on the practical effects which that scheme actually has had. Since no candidate, black or white, has won with a mere plurality since 1981, and only one black candidate

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tion against black citizens in Delaware and New Castle County, including: the use of poll taxes and a literacy test for voting; *de jure* segregation of schools, universities, public accommodations and housing; and racial discrimination in public employment. Pet. App. 98a-99a. This discrimination was reflected in continuing severe socioeconomic disparities between black and white citizens. Pet. App. 99a. However, the court ruled that this history of racial discrimination and its continuing effects on black citizens were irrelevant because the disparity in voter turnout between blacks and whites was not as great in school board elections as in elections for other offices. Pet. App. 99a-100a. The district court also found against plaintiffs regarding other Senate Report factors such as discrimination in slating practices and the use of racial appeals. Pet. App. 101a-115a.

[4] As of the time of trial, moreover, the only black candidate who had ever attained a majority of the vote in a schoolboard election was a candidate who had no white opponent. She won the 1990 election held after this lawsuit was filed. Pet. App. 9a.

> has run in an election against more than a single opposing candidate since 1981, the court could not have concluded on this record that the plurality scheme had the actual effect of allowing the black voters of Red Clay to elect their representatives of choice even though the white voters consistently voted against the minority-preferred candidates in numbers sufficient to prevent those candidates from winning a majority of the overall vote.

Pet. App. 35a; *see also id.* at 6a, 31a-34a, 65a.

The Third Circuit remanded the case to the district court for further consideration under the correct legal standard. The Court also suggested that, on remand, the district court could receive evidence on the 1991 election that was held after the trial of the case. Pet. App. 65a-67a.

Because of its finding of error with respect to the district court's plurality-win theory, the Court of Appeals found it unnecessary to review plaintiffs' other assignments of error, including additional errors in the district court's evaluation of white bloc voting, Pet. App. 35a-36a, and errors in the district court's treatment of the Senate Report factors. Pet. App. 65a. The Court also ruled that the alternative grounds defendants advanced to uphold the district court's judgment did not obviate the need for a remand in light of the district court's error in applying *Gingles* factor III. Pet. App. 35a-67a.

**REASONS WHY THE PETITION SHOULD BE DENIED**

The Third Circuit's decision is an interlocutory opinion which remanded the case to the district court for further consideration and which suggested that the district court receive additional evidence prior to determining the merits of respondents' claim under Section 2 of the Voting Rights Act. Therefore, this case is not ripe for review by this Court.

Furthermore, the Third Circuit's decision does not raise the questions presented in the petition for certiorari. The district court found that black citizens have not enjoyed persistent proportional representation on the Red Clay School Board, and the Court of Appeals affirmed the district court's factual findings on that point. In addition, the petitioners were given a full opportunity to attempt to establish a non-racial motivation for racially polarized voting patterns in the school district, but the evidence strongly refuted their theory and neither the district court nor the Court of Appeals credited petitioners' factual contentions about this alleged cause for black candidates' defeat. The alleged "conflicts" created by the Third Circuit's decision are based upon faulty factual assertions and misstatements about the Court's decision, including invented quotations which do not appear in the Third Circuit's opinion.

## I. THIS CASE IS NOT RIPE FOR REVIEW BY THIS COURT BECAUSE THE DECISION OF THE COURT OF APPEALS REMANDED THE CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

The Third Circuit has remanded this case to the district court for further proceedings. Pet. App. 66a-67a. The record may be expanded upon remand to the district court, and the additional proceedings could obviate any justification for review. At this time, therefore, the case is not ripe for issuance of a writ of certiorari. *See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ [of certiorari] is not issued until final decree"); *see generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 224-26 (6th ed. 1986). No reason

exists to depart from the general rule against review of interlocutory judgments in this case.

Further, the interlocutory nature of the decision below also requires denial of petitioners' request to "hold" this case pending the disposition of other voting rights cases before this Court. Even if, contrary to fact (*see infra* at n.19), any voting rights case now before the Court raised issues relevant to the disposition of this case, the lower courts will have a full opportunity to address any new decisions in the course of the further proceedings that must be conducted in this case. Thus, because the Court of Appeals' decision is non-final, the denial of certiorari will not deprive petitioners of an opportunity to argue the relevance of any decisions issued by this Court.

## II. THERE EXIST NO SPECIAL OR IMPORTANT REASONS FOR THE ISSUANCE OF A WRIT OF CERTIORARI AS REQUIRED BY RULE 10 OF THE RULES OF THIS COURT.

### A. Both Courts Below Found that Black Citizens Have Been Underrepresented on the School Board, and Further Review of this Factual Issue by this Court Is Unwarranted.

Petitioners incorrectly assert that the Court of Appeals found that black citizens have enjoyed persistent proportional representation on the Red Clay School Board,[5] and that the decision to remand the case to the district court is therefore in conflict with decisions of other courts which have upheld a defense to Section 2 claims based on sustained proportional representation of minority citizens.

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[5] The petitioners misleadingly quote a portion of the Court of Appeals' opinion which *mentioned* the petitioners' arguments concerning proportional representation, Pet. at 8, but fail to quote the next sentence, which states: "The defendants' argument fails, however, in light of the district court's finding on this issue." Pet. App. 55a.

The factual premise of this "conflict" is flatly incorrect. The district court specifically found that there had been "some *under-representation* of black citizens on the Red Clay Board" and that "some of the black candidates' success may have occurred in unusual circumstances." Pet. App. 81a (emphasis added). The Court of Appeals carefully reviewed these findings, including the findings of unusual circumstances in elections where minorities were successful, and stated:

> We conclude that the court's finding in this regard was not clearly erroneous as the record amply supports a finding that the black voters of Red Clay have not achieved persistent proportional representation.

Pet. App. 56a.

In reaching this decision the Court of Appeals followed this Court's opinion in *Thornburg v. Gingles*. *Gingles* held that a history of "persistent proportional representation" of minorities may, depending upon the circumstances, prevent a successful challenge under Section 2. 478 U.S. at 77. However, *Gingles* held that the circumstances surrounding minority electoral success should be examined because the success of one or a small number of minority candidates does not necessarily negate a showing of legally significant white bloc voting. 478 U.S. at 57, 75-76. Indeed, the *Gingles* test for legally significant white bloc voting makes this clear: white bloc voting is legally significant when "the white majority votes sufficiently as a bloc to enable it—*in the absence of special circumstances, such as the minority candidate running unopposed—usually* to defeat the minority's preferred candidate." *Id.* at 51 (emphasis added).

As described above, both the district court and Court of Appeals found that black candidates' success in 1981 and 1990 occurred under unusual circumstances, one candidate winning by a plurality against five white opponents, and the other winning when no white candidate filed for the seat. As the Court of Appeals noted, "the

[district] court found that both the election of Roberts in 1981 and Scotton in 1990 were accompanied by special circumstances and refused, based on those findings, to accord full weight to either election." Pet. App. 57a. The Third Circuit, therefore, did not merely find that black candidates had usually been defeated, but correctly examined the circumstances surrounding the election of those who were successful and affirmed the district court's finding that unusual circumstances were present in those elections. Pet. App. 55a-57a. If such elections are discounted, there is *no* evidence of black electoral success in Red Clay *in the absence of special circumstances*, which is the test mandated in *Gingles*.[6]

A comparison with the facts in *Gingles* shows the weakness of petitioners' claim. Although black candidates had been elected to office in all of the legislative districts at issue in *Gingles*, 478 U.S. at 74 nn. 35 & 36, this Court rejected the defense of proportional representation in all but one district. In that district, which was 36% black, a black candidate had been elected to one of the three available seats every year for ten years, and plaintiffs failed to offer any evidence of unusual circumstances affecting the success of most of the black candidates. 478 U.S. at 74-77 and n.35. In other districts, where black electoral success, though substantial, did not amount to "persistent proportional representation," the Court rejected the proportional representation defense. *Id.; see also* Pet. App. 53a-54a, 57a.[7]

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[6] It is immaterial that, in discussing some of the black candidates' success, the Court of Appeals mentioned that legally significant white bloc voting could be found even if the black candidates' success were *not* due to special circumstances. Pet. App. 53a. Since the district court *did* find unusual circumstances in two elections, the point is academic and presents nothing for this Court to review.

[7] For example, in House District 21, a black candidate had been elected to the six-member delegation in the previous two elections, while in House District 39, a black candidate had twice been elected to the five-member delegation before the lawsuit was filed and two

Further, because the Court of Appeals recognized and fully applied the principle that persistent proportional representation may provide a defense in a Section 2 case, there is no conflict between the Court of Appeals' decision and other decisions holding that persistent proportional representation may provide a defense.[8] No decision cited by petitioners holds that a court *may not* take into account the circumstances surrounding a black candidate's success in determining whether black voters have enjoyed persistent proportional representation sufficient to defeat a Section 2 challenge to an at-large election system.[9] Indeed, such a holding would be flatly contrary to *Gingles*.

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more blacks were elected while the litigation was pending. 478 U.S. at 74 & nn. 35 & 36. The Court upheld findings of Section 2 violations in these districts.

[8] In *Valladolid v. City of National City*, 976 F.2d 1293 (9th Cir. 1992), on which petitioners rely (Pet. at 14), the court granted summary judgment against plaintiffs because plaintiffs were unable to identify *any* minority-preferred candidate who had been defeated. The minority-preferred candidates had been successful in *each* of the three elections plaintiffs analyzed. 976 F.2d at 1296-97. Moreover, nothing in the split concurring opinions in *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 1023 (1991), would require a factual finding in favor of petitioners on their claim of proportional representation, and those concurring opinions do not constitute precedent in any event. The other decisions cited at p. 17 of the petition are cases where black voters attained proportional representation because of the creation of black majority single-member districts that clearly gave black citizens the ability to elect candidates of their choice; those decisions have no bearing on this case. *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2334 (1993); *Seastrunk v. Burns*, 772 F.2d 143 (5th Cir. 1985).

[9] In addition, petitioners' method of calculating "proportional representation" is misleading. According to petitioners, if three of ten black candidates, or 30%, have been elected, and black voters constitute 14% of the population, a defense of proportional representation has been established as a matter of law. Even apart from the need to consider the circumstances of the elections, this

Finally, petitioners erroneously claim that the Third Circuit refused to consider minority electoral success as an aspect of the third *Gingles* factor. Pet. at 18-19. Purporting to quote the Third Circuit, they assert that the Third Circuit described the issue of proportional representation and the issue of *Gingles* factor III as " 'separate contexts.' " Pet. at 18, citing Pet. App. 25a. Petitioners claim that this conflicts with decisions of other courts that "have dealt with minority electoral success as part of their analysis of whether bloc voting 'usually defeats' minority-preferred candidates." Pet. at 18.

Regrettably, all of this is an invention. The alleged quote concerning "separate contexts" appears nowhere on the cited page, and nothing on that page or anywhere else supports defendants' mischaracterization of the Court's opinion. In fact, the Court of Appeals' discussion on that page states the *opposite* of what petitioners claim. The footnote on that page takes issue with the district court for failing to address special circumstances explaining minority electoral success in its discussion of *Gingles* factor III, even though the district court noted

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approach is illogical. The ratio between the number of black candidates who run and the number who win bears no necessary relationship to whether minority representation has been proportional to minority population. *Gingles* did not employ such an analysis; rather than examining the "success rate" of minority candidates, *Gingles* focused on the racial composition over time of the legislative delegations in each district and the degree of black electoral success in each district in each election, using elections as the base of analysis (not the number of candidates). Thus, where minority representatives constituted one-third of the delegation of House District 23 in each of 6 elections, persistent proportional representation barred the Section 2 claim. 478 U.S. at 75, 77. Here, by contrast, although one black candidate sat on the seven-member school board from 1981 to 1985, the school board was all white from 1985 through 1990. This may be compared to House District 21 in *Gingles*, where the defense of proportional representation was rejected although two of the three black candidacies in the elections studied by the court were successful—a "success rate" of 67% under petitioners' theory. *Id.* at 74-76, 81.

those circumstances in its analysis of the proportional representation defense. Pet. App. 25a. As the Court of Appeals expressly states, "consideration of special circumstances is specifically mandated within the definition of the third *Gingles* factor." Pet. App. 25a. This ruling is fully in accord with *Gingles* as well as with the rulings petitioners cite as being in "conflict" with the Third Circuit's decision (*see* Pet. at 18-19).

**B. Petitioners' Failure of Proof with Respect to their Claim of "Non-racial Voter Motivation" Does Not Warrant This Court's Review.**

As with petitioners' "proportional representation" claim, the factual predicate for petitioners' second alleged conflict is simply missing and is based upon misrepresentations of the record and the lower courts' decisions. According to petitioners, the Third Circuit erred by "rejecting unrefuted evidence of a non-racial voter motivation for the election results at issue." Pet. at 19. Far from being "unrefuted" (petitioners also characterize this evidence as "uncontested," *id.* at 21, 24, and "uncontradicted," *id.* at 20), petitioners' effort to provide a non-racial explanation for the racially polarized voting patterns in Red Clay was specifically rebutted by respondents at trial.[10] *See, e.g.*, Pet. App. 87a-88a, 90a; *see also* Reply Brief of Plaintiffs-Appellants at 13-14. The *district court* did not rule that petitioners had successfully demonstrated a non-racial explanation for the defeat of black candidates supported by black voters, and thus it is hardly surprising or significant that the Court of Appeals did not adopt petitioners' view of the facts either.

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[10] Petitioners are certainly aware of the falsity of their assertion that the "feeder pattern" evidence was uncontested, since Respondents drew it to their attention in their Reply Brief in the Third Circuit, specifically canvassing the evidence refuting petitioners' claim. Reply Brief for Plaintiffs-Appellants at 13-14.

Indeed, petitioners' evidence on this point was extraordinarily weak. Petitioners' theory was that voters in the Red Clay District chose candidates based on whether they favored mandatory changes in "feeder patterns" (*i.e.*, assignments of neighborhoods to specific schools) to achieve racial balance, or whether they favored instead so-called "choice" or magnet school plans that would not require mandatory changes in "feeder patterns." However, there were *seven* election contests between black and white candidates on which evidence was presented at trial, and petitioners contended that this "feeder pattern" issue affected *only two* of those elections—the 1985 and 1988 elections. Moreover, in both of those elections the evidence strongly refuted petitioners' asserted "non-racial" explanation for the defeat of the black candidates. In 1985, the white candidate and the black candidate *both* favored *magnet school plans*;[11] nevertheless, black voters preferred the black candidate and white voters did not, with the result that the black candidate lost despite running as an incumbent. Pet. App. 8a, 28a. Similarly, in the 1988 election, plaintiffs' regression analysis and expert testimony established that the black vote went to the black candidate while the two white candidates received almost all of the white vote (Pet. App. 44a, 84a, 90a, 92a), even though—according to the defendants—the black candidate took the same position on the "feeder

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[11] The candidates' positions on the issue were reported in the principal Wilmington area newspaper prior to the election, which also stated after the election: "Because Roberts is black and Eckman is white, race became an issue in the election." In addition, both candidates specifically testified that they supported magnet school plans when they ran for the school board in 1985. The evidence on this issue is set forth in the Joint Appendix submitted to the Third Circuit. *See* Jt. App. 1 at 110-11 (testimony of black candidate Roberts); Jt. App. 3 at 1085 (deposition testimony of white candidate Eckman); Jt. App. 4 at 1406-1408 (newspaper articles on 1985 campaign).

pattern" issue as one of the two white candidates.[12] On this record, petitioners cannot support a claim that the lower courts erred in declining to adopt petitioners' version of the facts, and in any event such a claim does not warrant exercise of this Court's certiorari jurisdiction.

The petitioners erroneously declare that "[t]he Third Circuit specifically embraced the view of the Tenth Circuit in *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), *cert. denied*, 498 U.S. 937 (1990), that voter motivation is irrelevant in determining whether white bloc voting is 'legally significant,' thereby adopting the view of Justice Brennan's plurality opinion in *Gingles*, 478 U.S. at 63." Pet. at 19-20. This is a misrepresentation of the Third Circuit's decision. The "pertinent portion of *Sanchez*" which petitioners claim was "adopted by the Third Circuit", Pet. at 21, is alleged to be the passage at 875 F.2d 1493, which discusses whether racial bloc voting may be explained away with reference to underlying differences in the minority and majority population. The Third Circuit, however, did not cite or discuss that portion of *Sanchez v. Bond*.[13] The Third Circuit did describe a *different* portion of *Sanchez*—the *Sanchez* court's view of the relevance of elections in which no minority candidates competed. 875 F.2d at 1494-95, 1496; Pet. App. 40a-41a. That is a separate issue,[14] and petitioners'

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[12] *See* Joint Appendix submitted to Third Circuit, Jt. App. 3 at 927-32 (rebuttal testimony of plaintiffs' expert witness); Jt. App. 4 at 1512 (plaintiffs' rebuttal exhibit).

[13] Furthermore, petitioners are also mistaken in discussing the Third Circuit's citation of *Gingles*. Citing the Court of Appeals' opinion at Pet. App. 58a, petitioners state that the Third Circuit adopted Justice Brennan's views stated at 478 U.S. at 63. However, at Pet. App. 58a, the Court of Appeals does not mention that portion of *Gingles*; instead, it relies upon the *Gingles* majority opinion, 478 U.S. at 47-48.

[14] As an apparent afterthought, the petitioners suggest in a footnote that the Court could grant review to determine this "subsidiary" quesion—that is, the question of how to determine the

incorrect description of the Third Circuit's discussion of *Sanchez* presents nothing warranting review by this Court.

In any event, the Third Circuit had no occasion to consider whether proof of a "non-racial" motivation for racially polarized voting patterns bars a Section 2 claim, given petitioners' failure of proof on this issue. Accordingly, there was no occasion for the Third Circuit to "adopt" the position of *Sanchez v. Bond* on this issue, nor can its decision be said to "conflict" with the Fifth Circuit's decision in *League of United Latin American Citizens v. Clements* ["*LULAC*"], 999 F.2d 831 (5th Cir. 1993), *petition for cert. filed*, No. 93-630 (October 21, 1993).

The Third Circuit's actual discussion of white voter behavior occurred in a context different from that alleged by petitioners, and constitutes a wholly correct statement of the law with which no circuit is in conflict and which is not challenged in the petition for certiorari. In its discussion, the Court of Appeals correctly rejected the contention of defendants below, and the district court's ruling, that white bloc voting cannot by legally significant if the percentages of whites voting for white candidates and against black candidates is not consistent in every election. In this context, the Court of Appeals observed that "*Gingles* does not require a showing that white voters vote as an unbending monolithic block against whomever happens to be the minority's preferred candidate." Pet. App. at 34a. *See Gingles*, 478 U.S. at 56 (defining legally

"minority-preferred" candidate in elections that involve no minority candidates. Pet. at 21 n.6. Petitioners, however, do not claim that the Third Circuit erred in addressing this question. Moreover, this question merely raises the highly fact-intensive and case-specific issue of which elections should be considered probative in determining the existence of racially polarized voting. The various Court of Appeals' decisions cited by petitioners do not involve a true conflict on a controlling issue of law, but rather differing determinations on the merits of particular disputes based on differing sets of facts. *See* cases cited at Pet. at 21 n.6.

significant white bloc voting as a "white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes.").[15]

Clearly, in holding that white bloc voting need not occur at the same lockstep percentage in each election, the Third Circuit was addressing a far different issue than that presented in the Fifth Circuit's *LULAC* decision, on which petitioners rely. In *LULAC*, the Fifth Circuit found that partisan voting patterns, not racial voting patterns, explained the defeat of black and Hispanic candidates.[16] *See, e.g.*, 999 F.2d at 877-79. There is nothing inconsistent between that holding and the Third Circuit's ruling that a showing under *Gingles* factor III does not require an identical level of white bloc voting in each election. *See* Pet. App. at 34a-35a. Furthermore, the alleged conflict with the Fifth Circuit's *LULAC* decision is also illusory given that the Third Circuit expressly noted that it was not reaching the issue which divided the majority and the dissent in the panel decision in *LULAC*. Pet. App. 37a.[17]

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[15] The district court noted that plaintiffs' figures showed a maximum possible white vote for black candidates that "ranged from a low of 9 percent to a high of 53 percent" and ruled that "these varied results do not indicate a consistent pattern of whites voting against the black candidate." Pet. App. 97a. However, in *Gingles* white support for black candidates ranged from 8 percent to 50 percent in the primary elections and 28 percent to 46 percent in the general elections in the districts where this Court affirmed the findings of a Section 2 violation. 478 U.S. at 80-82.

[16] As noted above, the facts in this case did not support a similar "non-racial" explanation for the defeat of black candidates.

[17] As the Third Circuit stated: "We do not reach the related, but potentially more difficult question of what evidentiary weight, if any, should be given the election of minority candidates who are not the minority voters' candidate of choice. This issue produced a sharp split between the majority and the dissent in a recent opinion by the Fifth Circuit. *See League of United Latin American Citizens, Council No. 4434 v. Clements*, [986 F.2d 728 (5th

Petitioners next complain that "the Third Circuit held that the only inquiry in evaluating 'white bloc voting' is whether the 'candidate is truly the minority community's representative of choice.'" Pet. at 21, citing Pet. App. 40a, 41a. This is untrue. The phrase "white bloc voting" does not even *appear* at Pet. App. 40a-41a, and the remainder of the quotation has been wrenched violently out of context.[18] Indeed, the Third Circuit was discussing minority voting behavior, not white voting behavior, in that portion of its opinion.

Finally, petitioners contend that review should be granted because the Third Circuit's opinion prevents consideration of evidence other than the three *Gingles* factors in Section 2 cases. This is also untrue. The Third Circuit did acknowledge that proof of the *Gingles* factors is highly important. However, it also stated:

> The *Gingles* factors, however, are merely threshold considerations . . . . Therefore, even after a court has determined that the plaintiffs proved each of the *Gingles* factors, it must go on to consider whether the totality of circumstances, evaluated under "a

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Cir. 1993)] (addressing, among other issues, the effect of the election of black Republican judges to the vote dilution analysis), *reh'g en banc ordered on motion of the court*, 984 F.2d 634 (Feb. 11, 1993)." Pet. App. 37a n.10. This issue also divided the majority from the dissent in the Fifth Circuit's subsequent *en banc* decision. 999 F.2d 831.

[18] The sentence containing the phrase quoted by petitioners actually states:

> While the court in *Sanchez* provided some guidance for determining which candidates may be considered minority-preferred, we believe it is important to embellish slightly on its standard, as described below, to emphasize two points: (1) that not all minority candidates will be minority-preferred; and (2) that it is important to look beyond whether a white candidate received a majority of the minority community's vote and determine whether that white candidate is truly the minority community's representative of choice.

Pet. App. 41a.

> searching practical evaluation of the 'past and present reality' " and a "functional view of 'political process,' " establishes that the particular voting scheme diminishes the minority group's opportunity fully to participate in the political process.

Pet. App. at 16a (citations omitted). Having reversed the district court for error in applying *Gingles* factor III, the Third Circuit declined to assume that the district court's evaluation of the totality of circumstances would be unaffected by the correction of this error, and therefore remanded the case. Pet. App. 63a. The Third Circuit's remand for such further consideration was appropriate and presents nothing warranting this Court's review.[19]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[19] As noted earlier, because the Third Circuit's decision is interlocutory and a remand is necessary, there is no reason to "hold" this case pending the outcome of *Johnson v. DeGrandy*, No. 92-519 (consolidated with *DeGrandy v. Johnson*, No. 92-593, and *United States v. Florida*, No. 92-767), *Holder v. Hall*, No. 91-2012, or *LULAC*. In any event, those cases raise entirely different questions, and no decision in those cases can remedy the factual deficiencies that undermine the petitioners' allegations here. In the unlikely event that the outcome here would be affected by pending cases, the lower courts can certainly apply any new decisions in the course of the further proceedings to be conducted on remand.

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No. 93-812

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,
*Petitioners,*

v.

ALDEN JENKINS, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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*Johnson* v. *DeGrandy*, No. 92-519 (consolidated with *DeGrandy* v. *Johnson*, No. 92-593, and *United States* v. *Florida*, No. 92-767) . . . . . 2

*League of United Latin American Citizens, Council No. 4434* v. *Clements*, 999 F.2d 831 (5th Cir. 1993), *petition for cert. filed*, No. 93-630 (October 21, 1993) . . . . . 6

*Nash* v. *Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992), *aff'd sub nom. African American Voting Rights Legal Defense Fund, Inc.* v. *Blunt*, 113 S. Ct. 1809 (1993) . . . . . 3

*Sanchez* v. *Bond*, 875 F.2d 1488 (10th Cir. 1989), *cert. denied*, 498 U.S. 937 (1990) . . . . . 5

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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No. 93-812

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RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,
*Petitioners*,

v.

ALDEN JENKINS, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## REPLY BRIEF FOR PETITIONERS

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Respondents' Brief in Opposition attempts to recharacterize the legal issues in this case as factbound arguments over a particular record. It does so under cover of a shrill attack that further seeks to divert attention from the opinion under review. Respondents have presented no valid reason why the Court should not grant review now to provide guidance on the important voting rights questions presented.

1. The court of appeals' remand to the district court provides no reason to delay review of the important issues raised in the petition. The Court routinely grants certiorari to review legal issues following court of appeals decisions ordering further proceedings on remand. *See, e.g., Denton* v. *Hernandez*, 112 S. Ct. 1728, 1732 (1992); *Holmes* v.

*Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1315-16 (1992); *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 112 S. Ct. 683, 687 (1992). No further proceedings on remand can alter the court of appeals' holding that the record below supports a vote dilution claim despite minority electoral success exceeding proportional representation. Neither will the proceedings on remand alter the court of appeals' refusal to consider evidence of non-racial voter motivation as part of its Section 2 analysis. Review is appropriate at this time.

The potential proceedings on remand also have no effect on the propriety of withholding disposition of this petition until the Court renders its opinions in *Johnson* v. *DeGrandy*, No. 92-519 (consolidated with *DeGrandy* v. *Johnson*, No. 92-593, and *United States* v. *Florida*, No. 92-767); and *Holder* v. *Hall*, No. 91-2012. Both the briefs and the oral arguments in those cases devoted substantial attention to the relevance of proportional representation in vote dilution claims. The Court's decisions in these cases are likely to provide important guidance in any further proceedings here.

Contrary to petitioner's suggestion that the "lower courts will have a full opportunity to address any new decisions," Br. Opp. 7, 18, the district court will of course proceed under the Third Circuit's opinion. New guidance from the Court on the correct approach to Section 2 would only leave the district court in a difficult position. It would be far fairer and more efficient to withhold a decision on this petition until *Holder* and *DeGrandy* are decided. While the better course would be to grant plenary review now, holding the petition would at least allow the Court to vacate the court of appeals' opinion and remand for further consideration if the decisions in the pending cases make it appropriate to do so.

2. Respondents' assertion that the opinion below was merely a routine rejection of a claim of "persistent

proportional representation," Br. Opp. 10, misses the whole point of the petition. As the petition made clear, a key problem with the Third Circuit's opinion is that it addressed the evidence of proportional minority electoral success *only* in the context of persistent proportional representation. *See* Pet. 18. The court of appeals omitted any consideration of proportional minority success in the context of the third *Gingles* factor. It is this aspect of the Third Circuit's holding — that white bloc voting "usually defeats" minority-preferred candidates despite minority electoral success in excess of proportional representation — which merits the Court's review.[1] *See* Pet. 18 (discussing divergent approach on "usually defeats" issue taken by *Nash* v. *Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992), *aff'd sub nom. African American Voting Rights Legal Defense Fund, Inc.* v. *Blunt*, 113 S. Ct. 1809 (1993)).

Respondents also recharacterize the court of appeals' opinion in other ways to make the court's legal holdings appear factbound. First, respondents describe as "misleading" the quotation of the court of appeals statement that the Red Clay minority success rate "exceeds proportional representation." Br. Opp. 7 n. 5. The best refutation of respondents' suggestion that this passage from the court of

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[1] Respondents' sole acknowledgement of this aspect of the petition is their shrill claim of "invented quotations." *See* Opp. Br. 11-12. It is true that in describing proportional representation and white bloc voting as distinct issues the Third Circuit used the words "two contexts" instead of the words "separate contexts." *See* Pet. App. 58a. Petitioners regret any confusion this misplaced quotation mark may have caused to respondents or the Court. But the fact remains that relevant portion of the court of appeals' opinion clearly distinguishes between white bloc voting and proportional representation. *Id.* The salient points are these: (1) the Third Circuit expressly stated that proportionality and white bloc voting were separate issues; and (2) the Third Circuit refused to address proportional minority electoral success in the context of evaluating white bloc voting, despite the requirement white bloc voting "usually defeat" minority-preferred candidates.

appeals' opinion merely "mentioned the petitioners' arguments," *id.*, is the opinion itself. *See* Pet. App. 54a-55a. The court of appeals plainly stated its recognition that the minority success rate exceeded proportional representation. Its statement in the following sentence that "defendants' argument fails, however, in light of the district court's finding on [persistent proportional representation]" is not a denial of the magnitude of minority electoral success; it is a rejection of defendants' position *despite* that success. *See id.* This is the exact point on which petitioners seek review.

Even less credible is respondents' contention that review is inappropriate because the opinion below depended upon factual findings of "special circumstances" in the relevant elections, Br. Opp. 8-10. The court of appeals *expressly disclaimed* any reliance on special circumstances in its holding on white bloc voting. Pet. App. 25a. It similarly excluded from its holding the question whether particular election results should be excluded from the analysis. Pet. App. 52a. Respondents' only acknowledgment of this critical point is their conclusory assertion that the court of appeals' description of the scope of its own holding is "immaterial," and the issue "academic." Br. Opp. 9 n. 6. Again seeking to turn a legal issue into a factual one, respondents emphasize that the *district court* relied on special circumstances. *Id.* The petition, however, seeks review of the *court of appeals* opinion. The court of appeals itself cast its holding in clear legal terms, unencumbered by any factual issue of special circumstances. *See* Pet. 12.

3. With respect to the issue of the relevance of voter motivation to vote dilution claims, respondents ignore the court of appeals' opinion altogether. Respondents present their own characterizations of trial testimony and the record below as though they were judicial findings. *See* Br. Opp. 13. Respondents' description of the record on the voter

motivation issue is not accurate.[2] But this is beside the point. The court of appeals did not, as respondents imply, Br. Opp. 12, reject particular factual evidence for "failure of proof." The court of appeals simply refused to consider evidence of racial motivation *at all*. It did so in compliance with the Tenth Circuit's opinion in *Sanchez* v. *Bond*, 875 F.2d 1488, 1493 (10th Cir. 1989), *cert. denied*, 498 U.S. 937 (1990), which it approved and adopted. *See* Pet. 21, Pet. App. 40a-41a.

Respondents' assertion that the *Sanchez* approach is not the law in the Third Circuit, Br. Opp. 14, is particularly

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[2] Expert evidence at trial showed a conclusively high degree of "correlation between the neighborhood of a voter and voter's choice of candidates with a particular view on the feeder pattern issue." Pet. App. 87a; Transcript of Dunivant trial testimony at 742 (noting "extreme degree of correlation"). Respondents' expert stated he would not rely on these correlations, however, because several validating statistical "assumptions were violated." Pet. App. 87a. But the district court rejected the expert's conclusion that these "assumptions" must be met in the context of evaluating the respondents' expert evidence. Pet. App. 86a, 90a. With the assumptions eliminated, the evidence on voter motivation stood unrefuted. Respondents' complaint that the feeder pattern issue affected "only two" elections, Br. Opp. 13, is also misleading, for the feeder pattern issue arose only in elections held in 1985 and thereafter. Prior to 1985, even respondents cannot deny there was proportional minority representation on the Board. *See* Pet. App. 79a.

Respondents' *ad hominem* attack on petitioners' description of the voter motivation evidence as "uncontested" and "uncontradicted," Br. Opp. 12, is thus stylistically consistent with the rest of the Brief in Opposition, but unfounded. Petitioners have taken a consistent view of this evidence throughout the litigation. *See* Pet. 8 (*quoting* petitioners' presentation of the "uncontradicted" evidence from the *Brief for Defendants-Appellees* in the Third Circuit). Respondents are entitled to disagree. For purposes of this petition, however, the relevant issue is the court of appeals' complete rejection of *all* voter motivation evidence — just as respondents had requested in that court.

ironic in light of their arguments before that court. Respondents argued below that evidence of voter motivation is "legally irrelevant" and that bloc voting analysis is "simply ... a correlation between the race of the voters and the votes for white and black candidates, without regard for the reasons or motivation." *See* Pet. 9 (*quoting Reply Brief for Plaintiffs-Appellants* 11-12). The court of appeals accepted respondents' view, and refused to address this evidence. The Fifth Circuit, in direct contrast, holds that voter motivation is highly relevant, and that nonracial voter motivations foreclose a vote dilution claim. *See League of United Latin American Citizens, Council No. 4434* v. *Clements*, 999 F.2d 831 (5th Cir. 1993), *petition for cert. filed*, No. 93-630 (October 21, 1993) ("*LULAC*").[3] The court should grant certiorari to address the issue.

Respectfully submitted,

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[3] Respondents' contention that the Third Circuit expressly reserved any holding on "the issue which divided the minority and the dissent in the panel decision in *LULAC*," Br. Opp. 16, is entirely off target. Respondents attempt to point at an issue raised in the *panel opinions* in *LULAC* pertaining to the evidentiary weight to be accorded the election of minority candidates who are not minority preferred. *Id.* at n. 17. The issue raised in this petition, however, is one from the Fifth Circuit's *en banc* opinions in *LULAC*. It is the more basic one concerning the relevance of voter motivation.